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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1937.

No. 5

CHESTER C. DODGE, CATHERINE L. BAIRD, AZILE B. REYNOLDS, ET AL.,

Appellants.

vs.

BOARD OF EDUCATION OF THE CITY OF CHICAGO, ET AL.,

Appellees.

APPEAL FROM THE SUPREME COURT OF THE STATE OF ILLINOIS.

BRIEF FOR APPELLEES ON RE-ARGUMENT.

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APPEAL FROM THE SUPREME COURT OF THE STATE OF ILLINOIS.

BRIEF FOR APPELLEES ON RE-ARGUMENT.

Opinion Below.

The opinion of the Illinois Supreme Court is officially reported in *Dodge* v. *Board of Education*, 364 Ill. 547 (R. 265).

Statutes Involved.

The statutes involved are set forth in the appendix.

Miller Law as in force prior to the Act of July, 1935.

Miller Law of 1935.

Question Presented.

The sole question in this case, other than that of jurisdiction, is, did the act of the legislature of the State of Illinois, commonly called the Miller Law of 1926 as amended in 1927 grant to Chicago teachers vested property rights in future installments of the pensions created by that law, which could not be reduced by a subsequent act of the legislature without impairing the obligation of a contract?

STATEMENT.

A consideration of the history of the pension laws of Illinois pertaining to Chicago school teachers we believe will assist in understanding the questions involved.

Chicago's retired school teachers continuously since 1926 have been the recipients of two pensions, each separate and distinct from the other—one, under the regular Teachers' Pension and Retirement Fund Act; the other, under the so-called Miller Law. No other school system or public body so far as we have been able to discover has a system of double pensions.

The General Assembly of Illinois in 1895 made provision for pensions for school teachers of the Chicago public school system, who voluntarily retire. This fund, which is not involved in this suit, was originally maintained solely by voluntary contributions from teachers. That law has been amended many times. It is now a part of the School Act and appears in Par. 175 (Sec. 152) to Par. 190 (Sec. 165) of Chap. 122, Ill. R. S. 1937. It is commonly known as the "Public School Teachers' Pension

and Retirement Fund Act," deriving its name from the fact that the fund created by the statute is called in the statute "the Public School Teachers' Pension and Retirement Fund." The fund is now maintained by a tax levied for that purpose under the authority of Par. 212d (Sec. 189½), Chap. 122, Ill. R. S. 1937, from appropriation required to be made by the School Board from moneys derived from taxes levied for educational purposes (Par. 190, Sec. 165, Ill. R. S. 1937), and from deductions from teachers' salaries made pursuant to Par. 178 (Sec. 155), Chap. 122, *id.*, of the School Law. The teachers' pension fund is administered by a board of trustees and all pensions payable under the Act are payable solely out of this fund.

The statute pertaining to this pension was amended in 1935 to increase the tax rate authorized to be levied pursuant to Par. 212d, Chap. 122, *id.*, and at the same time increased the amount of the pensions to be received under it by the teachers upon retirement to amounts ranging from $800.00 to $1,200.00 per annum, depending upon length of service. The retired teachers are continuing to receive their pensions under this Act, the validity of which is not challenged by appellants.

The General Assembly of Illinois, in 1925, passed a second pension law for teachers, commonly known as the "Miller Law." This Act was not presented to the Governor of Illinois for approval until May 19, 1926, and therefore did not become a law until that date. It is set forth on page 49 of the Transcript of Record filed herein. This Act provided for compulsory retirement of teachers aged 75 or over in 1926, aged 74 in 1927, aged 73 in 1928, aged 72 in 1929, and aged 70 or over in 1930, and provided for annual pensions of $1,500.00 to each teacher so retired.

This grant was in addition to the pension received by such retired teachers from the regular Teachers' Pension Fund above referred to. The Miller Law expressly provided that nothing in the Act contained should in any way impair or prejudice any right of a teacher to the pension under the Teachers' Pension and Retirement Fund Act (R., 50).

In 1927 the Miller Law was amended by adding Section 3, which provided for pensions on a sliding scale ranging from $1,000.00 to $1,500.00 per year to teachers voluntarily retiring between the ages of 65 and 70 (R., 62-63).

This section was repealed by the Act of 1935.

The Miller Law as originally adopted or as subsequently amended neither established nor made provision for the establishment of a fund out of which such pensions are payable. The law does not authorize or provide for deductions from teachers' salaries of any money to be used towards the payment of such pensions and teachers contribute nothing towards these pensions. These pensions are, by the Act, expressly made payable solely from moneys derived from the general tax levy for educational purposes—the tax provided by law for the payment of salaries of teachers and others actively engaged in operating the schools of Chicago. The educational taxes are levied annually pursuant to Section 189⅛ of the School Law, Par. 212-a, Ill. R. S. 1937.

These pension provisions of the Miller Law are all found in Sections 2 and 3 of the Act. Section 1 of the Act pertains solely to retirement.

The Miller Law having become effective May 19, 1926 (R., 49), the Superintendent of Schools, pursuant to its provisions, on July 28, 1926, reported the names of a total

of twenty persons who on August 1, 1926, would be required to be retired pursuant to the Act and be paid the sum of $1,500.00 annually (R., 12-13). This required an expenditure of $12,000.00 during the year 1926 by the Board of Education out of educational taxes. On January 12, 1927, fourteen additional persons were retired (R., 74).

These retirements increased annually and the amounts required to be paid to teachers retired pursuant to this Miller Law had increased to such an extent that the Board was required to and did appropriate for this expense in its annual school budget for the year 1935 the sum of $1,125,000.00 (R., 115, 132).

Under Section 2 of the Miller Law (Par. 614b, Chap. 122, Ill. R. S. 1937) set forth in the appendix, this $1,125,000.00 was required to be paid out of the taxes levied for educational purposes for the year 1935, which taxes were limited by statute to $43,000,000.00 (Par. 212a, Chap. 122, Ill. R. S. 1937).

An attempt has been made by the appellants in their reply brief heretofore filed herein and in their oral argument to show that the constantly growing annual expenditure for Miller Law pensions (the appropriation for which in 1935 amounted to $1,125,000.00) was small in proportion to the total amount appropriated ($187,270,890.97) for educational purposes in 1935. They fail, however, to point out that over $138,000,000.00 of this amount was appropriated for the purpose of paying unpaid obligations of prior years. These unpaid obligations consisted of unpaid tax warrants for the years 1929, 1930, 1931, 1932, 1933 and 1934, with accrued interest thereon payable out of taxes levied for such years when collected, and other unpaid obligations of prior years properly chargeable to the educational fund. The Board is required by statute

(Par. 158a, Chap. 122, Ill. R. S. 1937) to appropriate each year, not only for current expenses but also for all unpaid obligations of prior years. For this reason, in the year 1935 over $138,000,000.00 was added to the appropriation for the current year's educational expenditures, making an aggregate appropriation in 1935 of $187,270,890.97.

The financial depression that we have been passing through seriously affected the Chicago Board of Education. It owed millions of dollars to teachers for past due salaries in addition to the millions owed for past due paper and other obligations of prior years, and was without funds. The burden of all this indebtedness falls on the taxpayer since the schools are maintained almost entirely by taxes.

The state of the Board's finances was before the Supreme Court in *Board of Education* v. *Upham*, 357 Ill. 263, a case involving a bond issue of the Board of Education, the proceeds of which were to be used for the payment of unpaid and past due teachers' salaries. The bonds were secured by a mortgage on the Board's real estate pursuant to a statute whose validity was challenged. The court in its opinion made the following finding of facts as to the financial condition of the appellee Board in 1934, on page 265:

> "The following facts are necessary to an understanding of the questions involved: The revenues of the board of education have been greatly diminished since 1928 on account of the non-payment and delay in the collection of taxes as well as the lowering of assessments of property values. As a result, the board has been unable to pay in full the salaries of its school teachers and other necessary expenses. Unpaid salaries of teachers and other employees amount to $25,600,000. For the current year 1934 the board has obligations for teachers' salaries and education

expenses in the sum of $25,000,000. There are past due claims amounting to $3,800,000, making a total of $54,400,000. There is no money in the treasury with which to meet these obligations. In 1930 the General Assembly, recognizing the credit impairment of certain municipalities and the necessity for raising cash to pay current liabilities, enacted a law which provided for the creation of a revolving fund out of the proceeds of the sale of bonds in the sum of $25,000,000. The board of education of Chicago availed itself of that law. In the long duration of the depression the fund so created became exhausted, and in 1933 the legislature added section 134-3/4 to the School Act. (Cahill's Stat. 1933, Chap. 122, Par. 158 [2]).

"This added section provides that in all cases where the board of education in cities having a population exceeding 500,000 inhabitants shall have heretofore created a working cash fund pursuant to section 134½ of the act, it may incur an indebtedness for the purpose of increasing such fund and issue bonds therefor in an amount not to exceed $40,000,000. Under conditions and limitations specifically set forth, the proceeds from the sale of the bonds are to be placed in that fund and are not subject to appropriation or budget expense. The board may, however, by resolution direct the transfer of money from that fund to the educational purposes fund. Provision is made for the restoration of the working cash fund from taxes and other revenues, when collected."

The proceeds of the bond issue in that case paid part of the past due teachers' salaries but the financing of current obligations such as teachers' payrolls and other educational expenses including Miller Law pensions presented a problem to the Board of balancing a budget on reduced revenue and required drastic economies.

Since the teachers' payrolls constituted the major part of the educational expenses, the Board proceeded first to reduce teachers' salaries. As disclosed by the answer of the appellees and the replication filed thereto the maximum

annual salary of an elementary teacher prior to the adoption of the amendment complained of was reduced as a result of the Board's economy measures to $1,912.50, and the salary of an elementary teacher in the lower group was reduced to $1,127.50 (R., 115, 152-153).

While the active teachers' salaries were reduced 23½% (R., 121) neither the pension paid from the regular Teachers' Pension and Retirement Fund nor the additional pension paid by the Board under the Miller Law out of taxes levied for maintaining the schools were reduced. The result was that the majority of the retired teachers received from both pensions a sum aggregating $2,500.00 per annum, or $587.50 more than the maximum salary received by elementary school teachers and $1,372.50 more than the salary received by teachers in the lower group for conducting classrooms daily (R., 115).

The legislature, in 1935, reduced the pension to be paid to retired teachers under the Miller Law to $500.00 per annum, in order to effect a substantial annual saving in the Board's expenditures and at the same time to correct the then existing unjust condition of payments to each retired teacher in excess of the maximum salary of the active elementary teacher. The effect of the amendment was that the total to be paid from the two pensions to the retired teachers in future installments annually in the great majority of cases was $1,500.00 per annum. In some few cases it would amount to $1,300.00, and in others to $1,700.00 per annum, depending on the date of retirement and length of service.

All pension installments due under the old Miller Law were paid before the Miller Law of 1935 became effective.

Appellants are teachers and a few principals who were retired or who sought to be retired pursuant to this Act

as originally adopted and as amended. As pointed out by appellants' brief, they fall into three classes: (a) one hundred sixty-two who were compulsorily retired at seventy years of age or over, pursuant to Section 1 of the Act (R., 2, 92, 165); (b) six hundred fifty who retired pursuant to Section 3 of the Act as amended in 1927 (R., 93, 95-100, 165, 166); and (c) one hundred thirty-two who made application for retirement pursuant to Section 3 of the Act during May and June immediately preceding the date the repeal of Section 3 of the Act became effective but whose applications were not acted upon by the Board until the Board compulsorily retired them pursuant to the Act complained of herein (R., 100-105, 167-169).

Appellants herein brought their suit in the Superior Court of Cook County, Illinois, for injunction. The decision of the Superior Court denying the injunction and dismissing the bill was affirmed by the Supreme Court of Illinois.

Appellees' Motion to Dismiss or Affirm.

The appellees, Board of Education of the City of Chicago, *et al.*, have filed a statement in this cause opposing jurisdiction and moving to dismiss, and in the alternative to affirm. An order was entered herein providing that further consideration of the motion to dismiss or affirm be postponed to the hearing of the case on the merits.

SUMMARY OF ARGUMENT.

I.

Pensions payable solely out of public funds are gratuities. The grant of them creates no vested right.

A. The Miller Law pensions are of this kind. They are payable solely out of general taxes levied for educational purposes. Teachers contribute nothing, either by voluntary payment or by way of salary deductions.

Smith-Hurd Ill. R. S. 1933, Chap. 122, Pars. 614 (a), 614 (b), 614 (c).

Ill. R. S. 1937, Chap. 122, Pars. 614 (a), 614 (b).

B. This court has held that pensions similar to the Miller Law pensions are gratuities that may be withdrawn at any time at the discretion of Congress.

Walton v. *Cotton*, 60 U. S. 355, 15 L. ed. 658.

U. S. v. *Hall*, 98 U. S. 343, 25 L. ed. 180.

U. S. v. *Teller*, 107 U. S. 64, 27 L. ed. 352.

Frisbie v. *U. S.*, 157 U. S. 160, 39 L. ed. 657.

Lynch v. *U. S.*, 292 U. S. 571, 78 L. ed. 1434.

C. The Supreme Court of Illinois has without exception held that pensions are not contractual; that they are mere expectancies based upon an anticipated continuance of existing law.

Eddy v. *Morgan*, 216 Ill. 437.

Ryan v. *Foreman*, 262 Ill. 175.

Hughes v. *Traeger*, 264 Ill. 612.

Pecoy v. *Chicago*, 265 Ill. 78.

Stiles v. *Board of Trustees*, 281 Ill. 636.

Beutel v. *Foreman*, 288 Ill. 106.

People v. *Retirement Board,* 326 Ill. 579.
People v. *Hanson,* 330 Ill. 79.
McCann v. *Retirement Board,* 331 Ill. 193.
Dodge v. *Board of Education,* 364 Ill. 547.
Raines v. *Board of Trustees' Pen. Fund,* 365 Ill. 610.

The following decisions cited by appellants as supporting the proposition that pensions are vested rights do not so hold.

Hughes v. *Traeger,* 264 Ill. 612..
People v. *Abbott,* 274 Ill. 380.

This was pointed out by Justice Carter in *Beutel* v. *Foreman,* 288 Ill. 106, who also wrote the opinion in *People* v. *Abbott,* 274 Ill. 380.

The following Illinois decisions cited by appellants as supporting their contention of vested rights in a pension are not applicable: *DeWolf* v. *Bowley,* 355 Ill. 530, as it involves no question of vested rights or power of the legislature to alter pension acts; *Porter* v. *Loehr,* 332 Ill. 353, which merely holds that a pension cannot be increased after retirement because it is extra compensation and therefore violates Section 19, Article 4 of the State Constitution.

D. Courts of other jurisdictions are all in accord and hold that there are no vested rights in future installments of pensions payable solely from public funds and to which no contributions are made. They differ only in what constitutes a contribution.

Mell v. *State,* 130 O. St. 306.
State ex rel. Zupnik, 131 O. St. 94.
Macfarland v. *Bieder,* 32 App. Cases D. C. 513.
Rudolph v. *U. S.,* 36 App. Cases D. C. 380.

Head v. *Jacobs*, 150 Ky. 290, 150 S. W. 349.
Passaic National Bank & Trust Co. v. *Eelman*, 116 N. J. Law, 279, 183 A. 677.
Gibbs v. *Relief Ass'n*, 125 Minn. 174, 145 N. W. 1075.

Even in jurisdictions where it is held that pensions are based on contracts, such pensions are subject to the inherent right of the legislature to modify.

City of Dallas v. *Trammell*, 101 S. W. (2d) 1009.
Casserly v. *City of Oakland*, 56 P. (2d) 237, 6 Cal. (2d) 64.
State ex rel. Holton v. *Tampa*, 119 Fla. 556, 159 So. 292.

E. Decisions of the several states relied on by appellants involve situations that are not comparable to that of the appellants and have no application to pensions such as are provided for under the Miller Law, for the following reasons:

(1) The statute under which pensioners claimed a right provided for contributions to a retirement fund created for that purpose.

Roddy v. *Valentine*, 268 N. Y. 228, 197 N. E. 260.
Dismuke v. U. S., 297 U. S. 167, 80 L. ed. 561.
Trotzier v. *McElroy*, 182 Ga. 719, 186 S. E. 817.
Retirement Board v. *McGovern*, 316 Pa. 161, 174 Atl. 400.
Renz v. *Hibbing Firemen's Relief Ass'n*, 186 Minn. 370, 243 N. W. 713.
Fellows Atty General v. *Connelly*, 193 Mich. 499, 160 N. W. 581.

(2) The court merely decided that the legislature by statute had the authority to provide for a pension scheme

for persons in service and no question of any subsequent act of the legislature was involved.

Bowler v. *Nagel,* 228 Mich. 434, 200 N. W. 258.

Matter of Mahon v. *Board of Education,* 68 N. Y. App. Div. 154.

DeWolf v. *Bowley,* 355 Ill. 530.

Fellows, Attorney General v. *Connolly,* 193 Mich. 499, 160 N. W. 581.

Mead v. *Acton,* 139 Mass. 341.

State ex rel. Gorczyca v. *City of Minn.,* 174 Minn. 594.

State ex rel. Stafford v. *State Annuity Board,* 219 Wis. 31.

State v. *Love,* 89 Neb. 149, 131 N. W. 196.

Cobbs v. *Home Ins. Co.,* 18 Ala. App. 206, 91 So. 627.

(3) The particular lump sum payment of pension had accrued and was past due.

Kavanagh v. *Police Commissioners,* 134 Cal. 50, 66 Pac. 36.

(4) The act under which the pensioner claimed a right to a pension was still in force and had not been changed by subsequent acts of the legislature.

Lage v. *City of Marshalltown,* 212 Ia. 53, 235 N. W. 761.

Renz v. *Hibbing Firemen's Relief Ass'n,* 186 Minn. 370, 243 N. W. 713.

II.

The Miller Law is an offer of a bounty and not an offer to contract.

A. This court has held that a State legislature may make an offer of bounty as distinguished from an offer to contract and although a detriment is suffered by a person or class of persons as a result of the offer of bounty, such person or class of persons acquires no rights which may not be modified by the legislature.

Christ Church v. *County of Philadelphia,* 65 U. S. 300, 16 L. ed. 602.

Welch v. *Cook,* 97 U. S. 541, 24 L. ed. 1112.

Grand Lodge of the State of Louisiana v. *City of New Orleans,* 166 U. S. 143, 41 L. ed. 951.

Salt Manufacturing Co. of East Saginaw v. *East Saginaw,* 80 U. S. 373, 20 L. ed. 611.

Wisconsin & Michigan Railway Co. v. *Powers,* 191 U. S. 379, 48 L. ed. 229.

Stanislaus County v. *San Joaquin, etc. Co.,* 192 U. S. 200, 48 L. ed. 406.

The Miller Law was passed in aid of a beneficent purpose. There was no necessity for the State to induce the teachers to retire at any certain age. It might at any time have passed a law providing that they should be compulsorily retired at a given age.

Anyone accepting the pension under the Miller Act did so without compulsion. He had the right to continue to teach or to retire with the additional pension. Likewise there was no compulsion on the part of the legislature to continue the Act in force.

The Miller Law differs from a law offering a special charter. There was no expression of an intention on the part of the legislature to make a contract rather than a law. It was a mere declaration of legislative policy and did not constitute an offer to irrevocably pay pensions of a certain amount.

Even though a law may be framed to give an expression of perpetuity, the courts will not construe perpetuity to be synonymous with irrevocability.

B. It has been uniformly held that public officers and employes acquire no vested rights to the incidents of their positions.

Butler v. *Pennsylvania,* 10 How. 402, 13 L. ed. 472.

Newton v. *Mahoning County Commissioners,* 100 U. S. 548, 25 L. ed. 710.

Crenshaw v. *United States,* 134 U. S. 99, 33 L. ed. 825.

Mississippi v. *Miller,* 276 U. S. 174, 72 L. ed. 517.

Phelps v. *Board of Education,* 81 L. ed. 388.

Private vested rights of property are clearly distinguishable from measures adopted by a body politic for the benefit of all and according to universal understanding, may be varied or discontinued as the public good shall require. So regulations of tenure of office and salaries are functions which governments are called upon to foster and promote for the general good and cannot be presumed to have surrendered. The same is true of pensions granted to public officers or employes.

III.

There is no consideration moving from appellants.

A. it was not necessary for the legislature to pass the Miller Law to induce satisfactory service of teachers, as the law already provided for their removal for unsatisfactory service.

Par. 186, Chap. 122, Ill. R. S. 1937.

B. There was no need to give a pension to induce retirement at the age of sixty-five or over, as the legislature had the power to compulsorily retire such teachers.

Groves v. *Board of Education* (Appendix, p. 102).
Phelps v. *Board of Education,* 81 L. ed. 388.

C. The Miller Law was an inducement to remain in the service rather than one to retire since the longer the teachers stayed in the service the higher the pension paid to him on retirement under Section 3 of the Miller Law.

D. Retirement pursuant to the provisions of the Miller Act resulted in no financial benefit to the Board.

IV.

If the Miller Act is to be construed as a legislative contract, this court should interpret the terms of that contract in the light of decisions of the Supreme Court of Illinois made prior to the formation of the contract.

A. The legislature knew the Supreme Court had always held that pensions were mere gratuities and subject to its control at all times.

Eddy v. *Morgan,* 216 Ill. 437 (1905).
Ryan v. *Foreman,* 262 Ill. 175 (1914).
Stiles v. *Board of Trustees,* 281 Ill. 636 (1917).

People v. *Retirement Board,* 326 Ill. 579 (1927).
Hughes v. *Treager,* 264 Ill. 612 (1914).
Pecoy v. *City of Chicago,* 265 Ill. 78 (1914).
Beutel v. *Foreman,* 288 Ill. 106 (1919).
People v. *Hanson,* 330 Ill. 79 (1928).

B. The Supreme Court has adhered to this interpretation since the passage of the Miller Act.

People v. *Retirement Board, supra.*
People v. *Hanson, supra.*
McCann v. *Retirement Board,* 331 Ill. 193
Dodge v. *Board of Education,* 364 Ill. 547.
Raines v. *Board of Trustees Pension Fund,* 365 Ill. 610.

C. Appellants knew or are presumed to have known the law of the State as defined in these decisions.

D. Such construction by the courts became an integral part of any contract claimed to have resulted from the Miller Act.

E. This court will interpret the terms of a contract created by legislative enactment in the light of the decisions of the Supreme Court of the State.

Anderson v. *Township of Santa Anna,* 116 U. S. 356, 29 L. ed. 633.
Ennis Waterworks v. *City of Ennis,* 58 L. ed. 1139, 233 U. S. 652.
Olcott v. *Board of Supervisors,* 83 U. S. 678, 21 L. ed. 382.
Douglas v. *Pike County,* 101 U. S. 677, 25 L. ed. 968.
Great Northern Railway Co. v. *Sunburst Oil and Refining Co.,* 287 U. S. 358, 77 L. ed. 360.

F. Weight will be given to decisions of the Supreme Court of the State, rendered prior to the enactment of the statute being interpreted by this court.

Anderson v. *Township of Santa Anna, supra.*
Olcott v. *Board of Supervisors, supra.*
Douglas v. *Pike County, supra.*

G. The decisions of the Supreme Court of Illinois on the subject of pensions rendered prior to the enactment of the Miller Law should be construed as reserving to the State the right to modify that law.

V.

The Miller Law of 1935 was passed pursuant to the sovereign power of the State of Illinois. It is a local governmental law and as such should be sustained by this court.

A. The establishment, maintenance and operation of a system of free schools is a sovereign power of the State.

Gong Lum v. *Rice,* 275 U. S. 78, 72 L. ed. 172.
Cumming v. *Richmond County Board of Education,* 175 U. S. 528, 44 L. ed. 262.
Marshall v. *Donovan,* 10 Bush. (Ky.) 681.

B. This court will interfere with the exercise of such power only with the greatest reluctance.

Cumming v. *Richmond County Board of Education, supra.*

C. In Illinois the General Assembly has full authority to enact such laws as it may deem necessary and expedient for the proper administration and regulation of public schools in the promotion of their efficiency.

Illinois Constitution, Art. VIII, Sec. 1.
Keime v. *Community High School District,* 348 Ill. 228.
Kinnare v. *City of Chicago,* 171 Ill. 332.

Lindstrom v. *City of Chicago*, 331 Ill. 144.
Groves v. *Board of Education* (Appendix, p. 102).

D. In the exercise of such sovereign power, the acts of the State may modify existing contractual rights.

Home Bldg. & Loan Assn. v. *Blaisdell*, 290 U. S. 398, 434, 78 L. ed. 413, 426.

E. Regulation of education has been considered as an exercise of the police power by the State.

Barbier v. *Connolly*, 113 U. S. 27, 28 L. ed. 923
Interstate Const. Co. v. *Massachusetts*, 207 U. S. 79, 52 L. ed. 111.
Louisville etc. R. Co. v. *Kentucky*, 161 U. S. 677, 40 L. ed. 849.

F. The State may exercise its police power so as to modify existing contracts.

Manigault v. *Springs*, 199 U. S. 473, 480, 50 L. ed. 274, 278.

G. The economic interests of a State justify the exercise of police power.

Home Bldg. & Loan Ass'n v. *Blaisdell, supra.*

VI.

Where a statute is claimed to create a contractual right, this court will give weight to the construction of the statute by the courts of the state, unless such construction is palpably erroneous.

Phelps v. *Board of Education of the Town of West New York*, 81 L. ed. 388.
Freeport Water Co. v. *Freeport*, 180 U. S. 587.
Tampa Water Works v. *Tampa*, 199 U. S. 241.
Milwaukee Elec. Ry. Co. v. *R. R. Com.*, 238 U. S. 174.
Seton Hall College v. *South Orange*, 242 U. S. 100
Coombes v. *Getz*, 285 U. S. 434.

ARGUMENT.

It is the contention of appellants that the Miller Act created a contractual relationship between the appellants and the Board of Education of the City of Chicago, whereby the appellants became vested with a right to receive for life $1,500.00 annually. They further contend that the Miller Act of 1935, insofar as it reduces the amount of money to be paid annually to said appellants from $1,500.00 to $500.00, is violative of Section Ten of Article One of and the Fourteenth Amendment to the Constitution of the United States.

In order to sustain the contention of appellants, it is necessary that this court find first that a contractual relationship was established between the appellants and appellees, and second that if a contractual relationship was established, that relationship vested appellants with rights which could not be divested by the State without contravening Section Ten of Article One of and the Fourteenth Amendment to the Constitution of the United States.

In order to establish a contractual relationship between appellants and appellees in the case at bar, the Miller Act must have constituted an offer to appellants and the appellants must have accepted the offer and furnished consideration for a contract.

It is the contention of appellees that no offer was ever made to the appellants to enter into a contract whereby they would, upon compliance with the terms of the Miller Act and the amendments thereto, receive $1,500.00 annually for life; that if it be held that the Miller Act constituted an offer to contract, appellants furnished no con-

sideration which would establish the contract contended for; that if this court should determine that appellants and appellees entered into a contract, the right of the legislature to decrease the pension provided for was an essential part of, and included as a provision in, that contract, and therefore that in decreasing the pensions the State did not impair any contract obligation nor divest appellants of any vested rights contrary to any provision of the Constitution of the United States; and that the Miller Act of 1935 was passed pursuant to the sovereign or reserved power of the State of Illinois and should be sustained as an exercise of that power.

We pointed out in our Statement Opposing the Jurisdiction and Motion to Dismiss or Affirm, heretofore filed herein, that the Federal question attempted to be asserted by appellants is foreclosed by previous decisions of this court, which has uniformly held that statutes providing for pensions or providing for tenure in office do not create contracts.

We further point out that since the Miller Act of 1935 was passed pursuant to the sovereign or reserved power of the State of Illinois, it is not subject to review by this court.

I.

Pensions payable solely out of public funds are gratuities. The grant of them creates no vested rights.

Section 1 of the Miller Act, effective 1926, provided for the compulsory retirement of teachers from active service, according to a schedule. It related solely to retirement and pensions are not mentioned. Its validity is not challenged.

Section 2 provides that upon such retirement each of said retired teachers should receive $1,500.00 annually from money to be derived annually from the general tax levies for educational purposes. Section 2 further provided that nothing in the Act contained should "in any way impair or prejudice any rights of a teacher, * * * so retired to annuity under other statutory provisions concerning any teachers' pension fund or teachers' pension and retirement fund, established in accordance with the provisions of any statute of this State; and shall not repeal or modify any other such statutory provisions."

When the Act was amended in 1927, Sections 1 and 2 remained as before; but a new section, Section 3, was added providing for a pension to be paid to those who voluntarily retired at ages between sixty-five and seventy years, and repeated therein the provision already found in Section 2 (reserving rights under the Teachers' Pension and Retirement Fund) providing that the payment "to be made under this section of the Act which it amends shall be in addition to any such annuity." This amendment also broadened the title of the Act. Section 3 of this Act was again amended in 1929, making minor changes not involved in this suit. Neither the compulsory retirement feature of the Act nor any other of its provisions were challenged and the Board, in accordance with the terms of this Act of 1926, as amended in 1927 and 1929, continued to make the required payments solely out of moneys collected from taxes levied annually for educational purposes.

This court has consistently held that no contract is created between the State and one who is pensioned under a benevolent purposes act, under the terms of which no fund is established and no contribution is required by the bene-

ficiary either in the form of deduction from salary or actual payment into a fund; that the grant of such a pension creates no vested right and that the legislature in its discretion may change, modify or reduce such a pension.

United States Supreme Court Decisions.

In the case of *Walton* v. *Cotton,* 60 U. S. 355, 15 L. Ed. 658, the court held that a pension of the character just described was "undoubtedly a bounty." In *United States* v. *Hall,* 98 U. S. 343, 25 L. ed. 180, the court reached the same conclusion.

Whether or not Congress could pass a law cutting off a pension that a person was receiving pursuant to a prior act was before this court in *United States* v. *Teller,* 107 U. S. 64, 27 L. ed. 352. The court held:

> "It was competent for Congress to pass this Act. No pensioner has a vested legal right to his pension. Pensions are the bounties of the Government, which Congress has the right to give, withhold, distribute or recall, at its discretion."

This principle of law strictly adhered to by this Honorable Court is also the law in Illinois and has never been departed from by the Illinois courts.

Appellants cite the case of *Pennie* v. *Reis,* 132 U. S. 464, 33 L. ed. 426, contending that the language in that case states their position in the case at bar. We respectfully submit that instead of supporting appellants' contention that there is a vested and contractual right in future installments of pensions, the case holds squarely to the contrary.

On page 471, the court said:

> "The direction of the State, that the fund should be one for the benefit of the police officer or his represen-

> tative under certain conditions, was subject to change or revocation at any time, at the will of the Legislature. *There was no contract on the part of the State that its disposition should always continue as originally provided.*" (Italics supplied.)

Another case wherein this court was called upon to determine whether a pension created a vested contractual right was *Frisbie* v. *United States,* 157 U. S. 160, 39 L. ed. 657. The court, on page 166, states:

> "The pension granted by the Government is a matter of bounty. 'No pensioner has a vested legal right to his pension. Pensions are the bounties of the Government, which Congress has the right to give, withhold, distribute, or recall, at its discretion.' *Walton* v. *Cotton,* 60 U. S. 355, 19 How. 355 (15:658); *U. S.* v. *Teller,* 207 U. S. 64, 68 (27:352, 354)."

In 1934, this court decided the case of *Lynch* v. *United States,* 292 U. S. 571, 78 L. ed. 1434, wherein it pointed out the distinction between benevolent purposes pensions, such as the one granted by the Miller Law, and annuities payable under a statute providing for war risk insurance under the terms of which the insured paid premiums provided for in a written contract or policy. Although this case was cited by appellants in their jurisdictional statement, we find that they failed to cite it in their brief in support of their claim of contractual vested rights. The reason is obvious.

On page 577, the court said:

> "* * * Pensions, compensation, allowances and privileges are gratuities. They involve no agreement of parties, and the grant of them creates no vested right. The benefits conferred by gratuities may be redistributed or withdrawn at any time in the discretion of Congress. *U. S.* v. *Teller,* 107 U. S. 64, 68 (27 L. ed. 352, 354), 2 S. Ct. 39; *Frisbie* v. *U. S.,* 157

U. S. 160, 166 (39 L. ed. 657, 659), 15 S. Ct. 586; *U. S.* v. *Cook*, 257 U. S. 523, 527 (66 L. ed. 350, 351), 42 S. Ct. 200."

Dismuke v. *United States*, 297 U. S. 167, 80 L. ed. 561, cited by appellants, involved a federal retirement act and the court held that the proviso in the Tucker Act withholding jurisdiction of suits on claims for pensions did not deprive the District Court of jurisdiction of claims under that retirement act as "the annuitant contributes to them by deductions from his salary or by actual payments into the fund" (p. 170). As we pointed out heretofore, the Miller pension grants come solely out of taxes annually levied for educational purposes and the teachers make no contribution whatever either by deductions from salaries or by actual payments into a fund.

Illinois Decisions.

The courts of Illinois following the decisions of this court, notwithstanding counsel's assertion to the contrary, have consistently held that pensions like the one involved in the case at bar are at all times subject to the control of the legislature. This was emphasized by Mr. Justice Stone, who, when rendering the unanimous opinion for the court below in the case at bar, on page 554, said:

> "The doctrine, as we have seen, is thoroughly established in this State that the State may control the giving or taking away of pensions * * *" (*Dodge* v. *Board of Education*, 364 Ill. 547).

On page 43 of appellants' brief the statement is made that until the decision in the Supreme Court of Illinois in the instant case, the Illinois law appeared to be settled that an annuity or a pension was not a gratuity but was a vested right, yet in their brief, page 47, appellants set up

a list of seven Illinois Supreme Court decisions which they concede hold that pensions are bounties springing from the graciousness of the sovereign which may be given or taken away at the discretion of the legislature. These cases are:

Eddy v. *Morgan,* 216 Ill. 437.
Ryan v. *Foreman,* 262 Ill. 175.
Pecoy v. *Chicago,* 265 Ill. 78.
Stiles v. *Board of Trustees,* 281 Ill. 636.
People v. *Retirement Board,* 326 Ill. 579.
People v. *Hanson,* 330 Ill. 79.
McCann v. *Retirement Board,* 331 Ill. 193.

Appellants' contention here is the same as it was in the court below, and is stated in the opinion of that court at page 550, as follows:

> "As is stated by counsel for appellants in their reply brief: 'Appellants' case rests upon the proposition that they have vested property rights to the payment of future installments of the annuities on the basis fixed by the law in force at the time they retired, or being entitled to retire made application for retirement.'"

The leading case on this proposition is *Beutel* v. *Foreman,* 288 Ill. 106. In this case it appears that one Beutel, on March 31, 1917, after having completed a service of twenty (20) years as a member of the police force, filed application for a pension. On July 12, 1917, his application was denied on the ground that the Police Pension Fund Act as amended on July 1, 1917, provided that no policeman should be pensioned after a service of twenty (20) years until he should have reached the age of fifty (50) years. Beutel had not reached the age of fifty (50) years on July 1, or on July 12, 1917. It was therefore contended that under the amendment to the Pension Act

effective July 1, 1917, he was not entitled to receive a pension.

It will be noted that the Pension Act in force prior to July 1, 1917, contained no fifty (50) year age requirement. In other words, the Pension Act in force on March 31, 1917 (the date of Beutel's application and the date according to appellants' theory when rights vest) did not require that the pensioner be fifty (50) years of age at the time of retirement. The amendment of July 1, 1917, did make such requirement.

It was earnestly contended in that case, as in the case at bar, that the event happened which vested his right to the pension on March 31, 1917 (petitioner having served the required period entitling him to a pension), before the law was revised; that he had made his application for retirement and hence the legislature could not take away that vested right to receive a pension by subsequent legislation without violating his vested property right protected by the Constitution. The court stated the position of the petitioner in that case as follows (page 109):

> "Counsel for defendant in error earnestly insist that the Pension act in force previous to July 1, 1917, gave him a contract and property right in his pension at the time he filed his application for the same, and therefore the amendment in question must be held to be unconstitutional because of violating a property right vested in him."

Counsel in the case at bar contend that since the teachers had completed the service, which under the old Miller Law entitled them to $1,500 pensions, they acquired fixed rights under it which could not be changed without violating the state and federal constitutions.

In the *Beutel* case, the police officer also had completed the service required under the law then in force and sev-

eral months before it was changed had filed his application for the pension provided by the Act.

In holding that no constitutional right of the claimant was violated by the legislature, the court, on page 109, said:

> "'But a right to be within its protection must be a vested right. It must be something more than a mere expectation, based upon an anticipated continuance of the existing law.'"

On page 112 the court further stated:

> "A full discussion of the question of vested rights in pension funds is found in *Gibbs* v. *Minneapolis Fire Department Relief Ass'n*, 37 Ann. Cas. 1915C, 749, (125 Minn. 174), and in the exhaustive note following the opinion. It was argued there, as here, that the right of a person claiming a pension was a vested one, and the opinion quoted from another decision with approval, as follows: 'The statute differs from a contract in that the government may withdraw the benefits conferred at any time it may deem advisable after a party enters the service, either before or after the right to a pension accrues. * * * It also follows that while there is no vested right in a pension which cannot be divested by the mere exercise of the legislative will, if relators have any rights they are vested ones so long, only, as the statute in question remains in force and unchanged, subject to be divested at any time that Congress may desire.' See also, *Stevens* v. *Minneapolis Fire Department Relief Ass'n*, 50 L. R. A. (124 Minn. 381), 1018, and note reviewing the authorities; 21 R. C. L. 242; 2 McQuillin on Mun-Corp., Sec. 511; 5 *id.*, Sec. 2422.
>
> "We can reach no other conclusion in this case than that by the great weight of authority in this and other jurisdictions, as between the State and the members of the police department of one of the municipalities in this State, the State may take the right of pension away, under such circumstances as shown by this rec-

ord, without affecting the contract right of the pensioners or violating the constitution."

The Illinois Supreme Court had occasion in *People* v. *Hanson*, 330 Ill. 79, to reiterate with approval the principles laid down in the *Beutel* case, *supra*.

In the *Hanson* case plaintiff in April, 1917, after having completed 20 years of service, made application for pension pursuant to the law in force at that time which provided for pension equivalent to one-half of officer's salary upon completion of 20 years of service. In June, 1917, the Act was amended by the legislature effective July 1, requiring applicant to be 50 years old. On July 12, 1917, the trustees denied his application as he was not 50 years old. In February, 1918, the Board placed his name on the roll from the date of his retirement until June 30, 1917. In September, 1921, the petitioner and others similarly situated entered into a compromise agreement whereby in consideration of the payment of a sum of money they released their claims to all back pensions and were reinstated on the pension roll as of August 1, 1921, and pensions were to be paid to them continuously thereafter.

The pension was paid to petitioner until June 29, 1925, when the Board struck his name off the roll and directed no further money be paid to him until he paid back all money paid him for the period prior to his attaining 50 years of age. This was done pursuant to an amendment passed in 1925, authorizing the Board to retain out of future payments any money paid to a pensioner through misrepresentation, fraud and error.

As stated by the court in its opinion (page 84), the questions of law raised were:

1. Was petitioner's right to a pension an expectancy, or did it become a vested right under the law in

force at the time of his retirement and application for a pension?

2. Was the compromise agreement of September, 1921, an accord and satisfaction?
3. Was the Act of 1921 in violation of section 13 of Article 4 of the Constitution?
4. Was the amendatory Act of 1925 constitutional?

The court, on page 89, held:

"The objection in the *Retirement Board* case to the amendment of 1925 was, that it contravened section 1 of the fourteenth amendment to the constitution of the United States, and section 2 of article 2 of the constitution of this state. The court said: 'This contention cannot be sustained. As against the State or its political subdivisions there is no vested right in a pension accruing in the future from month to month. (*Beutel* v. *Foreman*, 288 Ill. 106; *Gibbs* v. *Minneapolis Fire Department Relief Ass'n*, 125 Minn. 174, 145 N. W. 1075.) A pension is a bounty springing from the appreciation and graciousness of the sovereign and may be given or withheld at its pleasure. (*Eddy* v. *Morgan*, 216 Ill. 437.) There is no contract on the part of the State to continue the payment of a benefit or annuity, and a change in the law affecting such benefit or annuity does not impair the obligation of a contract or deprive a person of property without due process of law within the meaning of the constitutional provisions invoked. (*Pennie* v. *Reis*, 132 U. S. 464, 10 Sup. Ct. 149; *Pecoy* v. *City of Chicago*, 265 Ill. 78.'"

The Illinois Supreme Court in *McCann* v. *Retirement Board*, 331 Ill. 193, reaffirmed its previous holding that there was no vested right in future installments of pensions.

In *People ex rel. Donovan* v. *Retirement Board*, 326 Ill. 579, cited with approval in the *McCann* case, the court on page 582 said:

"Appellee contends that this section, insofar as it affects awards made prior to July 2, 1925, contravenes section 1 of the fourteenth amendment to the constitution of the United States and section 2 of article 2 of the constitution of this State. This contention cannot be sustained. As against the State or its political subdivisions there is no vested right in a pension accruing in the future from month to month. (*Beutel* v. *Foreman,* 288 Ill. 106; *Gibbs* v. *Minneapolis Fire Department Relief Ass'n,* 125 Minn, 174, 145 N. W. 1075.) A pension is a bounty springing from the appreciation and graciousness of the sovereign and may be given or withheld at its pleasure. (*Eddy* v. *Morgan,* 216 Ill. 437.) There is no contract on the part of the State to continue the payment of a benefit or annuity, and a change in the law affecting such benefit or annuity does not impair the obligation of a contract or deprive a person of property without due process of law within the meaning of the constitutional provisions invoked."

The General Assembly of the State of Illinois passed the Miller Act in the light of the decisions of the State's Supreme Court which we have just cited. The court had never departed from the premise that the legislature at all times had complete control over pensions and that it considered them gratuities or bounties which could be granted, modified or withdrawn at the discretion of the legislature. There is no expression in the Miller Act indicative of any intention on the part of the legislature to relinquish that control over pensions which the Supreme Court consistently stated that it possessed. The legislature passed these laws granting pensions in the light of the decisions of the Supreme Court. The beneficiaries of these pension acts avail themselves of such provisions with full knowledge of such construction. The mandate of the Constitution to establish and maintain an efficient system of free schools was not to be subordinated to an improvident

or excessive second and additional pension for retired teachers, which excessive amount must be paid in the face of financial conditions requiring drastic economies of every kind in the schools themselves, and the courts will presume that the Assembly in passing the Act providing for pensions, and the pensioners in accepting the benefits of such Act, knew there could be no surrender by the legislature of a reserved right to at all times control, by virtue of the legislative prerogative, the amount of such pension.

Notwithstanding the unequivocal language used in this long line of cases, which consistently adhere to the principle that there is no vested right in a pension accruing in the future from month to month, counsel contend that expressions used by the Illinois Supreme Court in holding pension laws valid are to be construed as indicating a departure from such principles. In support thereof they cite *Hughes* v. *Traeger*, 264 Ill. 612; *People* v. *Abbott*, 274 Ill. 380; *Porter* v. *Loehr*, 332 Ill. 353, and *DeWolf* v. *Bowley*, 355 Ill. 530.

In the case of *Beutel* v. *Foreman*, 288 Ill. 106, the court in disposing of a similar argument made by counsel in that case, at page 110, said:

> "Counsel are in error in their argument that the decisions of this court last referred to (*Hughes* v. *Traeger*, 264 Ill. 612, *People* v. *Abbott*, 274 *id.* 380) intended to hold that the right of a pension was a vested right."

The court in the *Beutel* case went on to say that the court had particularly stated the opposite and cited numerous cases to show that by the use of such language, it was not intended to hold that there was such a thing as a vested right in a pension. The opinion in the case of *Beutel* v. *Foreman*, *supra*, was written by the same justice who wrote the opinion in the *People* v. *Abbott* case, *supra*.

The case of *Porter* v. *Loehr,* 332 Ill. 353, does not involve the question of decreasing a pension but merely decides that a pension or an increase in pension cannot be given to a person who is no longer in the service, because it is an extra compensation and therefore in violation of Section 19 of Article IV of the Constitution of Illinois, which prohibits the General Assembly from granting or authorizing extra compensation, fee or allowance to any public officer, agent, servant or contractor after service has been rendered or a contract made. What the court did say about pensions appears on page 359 as follows: "The establishment and maintenance of a system of pensions is not a public duty or obligation—it is merely a question of policy, to be determined by a law-making body." This case does not hold directly or indirectly that there is any vested property right in future pension installments.

In the case of *DeWolf* v. *Bowley,* 355 Ill. 530, cited by appellant, there was no question of vested property rights or power to alter, reduce or withdraw a pension.

The Supreme Court of Illinois in a very recent decision (rendered since its opinion in the case at bar), *Raines* v. *Board of Trustees Pen. Fund,* 365 Ill. 610 (April, 1937), construed an act of the Illinois Legislature of 1935 amending the Illinois State Teachers' Pension and Retirement Fund Act (Smith-Hurd Revised Statutes, Chap. 122, Par. 578-612), applying to the smaller school districts and cities in Illinois. In that case it reaffirmed all its previous holdings to the effect that a pension payable solely out of public funds is in the nature of a bounty that may be given, withheld, distributed or recalled at the pleasure of the Legislature.

As this decision is the last word from the Supreme Court of Illinois on the subject of pensions, we take the liberty of quoting from the opinion (page 614):

> "The whole difficulty in this case arises from a failure to distinguish between a pension fund and an annuity fund derived in part from voluntary contributions made under a statutory option to contribute or refrain from contributing. A pension is in the nature of a bounty springing from the appreciation and graciousness of the sovereign, and may be given, withheld, distributed or recalled at its pleasure. (*People* v. *Retirement Board*, 326 Ill. 579; *Porter* v. *Loehr*, 332 *id.* 353; *Pecoy* v. *City of Chicago*, 265 *id.* 78.) For this reason it is held that a pensioner has no vested right in a pension fund."

In *Dodge* v. *Board of Education*, *Beutel* v. *Foreman*, *People* v. *Hanson*, *People* v. *Retirement Board* and *Raines* v. *Board of Trustees Pen. Fund*, *supra*, the Supreme Court of Illinois has consistently held that as against the State or political subdivision, there is no vested right in a pension accruing in the future from year to year as provided for under the Miller Law and there is no contract on the part of the State to continue the payment of such a pension. The change in the law affecting such pension does not impair the obligation of a contract or deprive a person of property without due process of law within the meaning of the constitutional provisions invoked by appellants.

No case in Illinois overrules or modifies the principles laid down by the case of *Beutel* v. *Foreman*, 288 Ill. 106. These principles are affirmed in all of the pension cases involving the question of vested rights which have been determined by the Illinois Supreme Court since that decision was handed down. In the instant case the court below as we pointed out heretofore, stated that "The doctrine as we have seen is thoroughly established in this State that the State may control the giving or taking away of pensions." All of the pension cases in Illinois, we respectfully submit, uniformly hold (a) that pensions pay-

able solely out of public money are not based on contracts, (b) that future installments of such pensions are not vested property rights, (c) that they are mere expectancies based on anticipated continuation of existing law, and (d) that the State may reduce future installments of such pensions without violating the provisions of the State or Federal Constitution.

Decisions in Other Jurisdictions.

The courts of other jurisdictions are in accord with the rule laid down by the Supreme Court of Illinois in conformity with the decisions of this Court and hold that there are no vested rights in future installments of pensions payable solely out of public moneys.

In Ohio pensions are held to be gratuities and not contracts creating vested rights. The leading case on that subject is *Mell* v. *State, ex rel.,* 130 Ohio St. 306 (a voluntary retirement case decided December 18, 1935). The question involved in that case was whether the Board had a right to reduce the pensions of those who had accepted the provisions of the act by voluntarily retiring.

The Supreme Court of the State of Ohio held that a pension was a gratuity, subject to the control of the donor and such pension was created by law rather than by contract and granted to the relator no vested rights. In so holding the court said on page 309:

> "A pension is generally defined as a gratuity, at all times subject to the will of the donor. It is a creature of law rather than a contract, and the pensioner has no vested right in the continuance of a gratuitous allowance.
>
> 'The unquestioned rule is that a pension granted by the public authorities is not a contractual obligation but a gratuitous allowance, in the continuance

of which the pensioner has no vested right; and that a pension is accordingly terminable at the will of the grantor, either in whole or in part.' 21 Ruling Case Law, 242. See also *Walton, Admr.* v. *Cotton,* 60 U. S. (19 How.), 355, 15 L. Ed. 658; *United States* v. *Teller,* 107 U. S. 64, 2 S. Ct. 39, 27 L. Ed. 352; *Pennie* v. *Reis,* 132 U. S. 464, 10 S. Ct. 149, 33 L. Ed. 426; *Frisbie* v. *United States,* 157 U. S. 160, 15 S. Ct. 586, 39 L. Ed. 657; *Gibbs* v. *Minneapolis Fire Dept. Relief Ass'n,* 125 Minn. 174, 145 N. W. 1075, Ann. Cas., 1915C, 749, and note.

'Pensions * * * are gratuities. They involve no agreement of parties, and the grant of them creates no vested right.' *Lynch* v. *United States* (1934), 292 U. S. 571, 54 S. Ct. 840, 78 L. Ed. 1434. To the same effect, *Gibbs* v. *Minneapolis Fire Dept. Relief Ass'n, supra.*"

The court further said that pensions are gratuities even where the pensioner had made compulsory contributions to the fund (quoting *Pennie* v. *Reis, supra*), and held that the right to a pension not being a vested one, a pension board could in its discretion modify or alter the pension, and in so holding, on page 310, said:

"The right to a pension not being vested, the board has a right at any time, in its discretion, to modify or alter pension awards by increasing or decreasing them, so long as it acts reasonably and not in an arbitrary fashion. This right the board may exercise pursuant to and under its own rules and regulations then prevailing, and, in the absence of abuse, mandamus will not issue to control its discretion.

The board has not acted illegally in effecting a reduction of relator's pension. We find no abuse of discretion."

This holding was reaffirmed by the Supreme Court of Ohio in a decision rendered April 29, 1926, in the case of *State ex rel. Zupnik,* 131 Ohio St. 94.

In Kentucky the holding is the same. In *Head* v. *Jacobs*, 150 Ky. 290, it appeared that a pension act was adopted March 3, 1904, providing for pensions to policemen. The relators were on pension under that act. In 1912 the General Assembly passed an act repealing the former Act and enacting another law which was to take the place of it, and provided that all pensions then in force under the law theretofore existing be declared ended and abolished. It further provided that the pensions and benefits under the old Act be continued as such by the Board organized under the new Act, if, under the terms of the new Act they would be entitled to apply for and receive pensions or benefits. The Board of Pensions declined to transfer the relators to the new roll and they brought suit to compel the Board to do so. The only question to be determined was whether the applicants were entitled as a matter of right to be transferred to the new pension roll. The court held that they had no such right, and said, on page 293:

> "A pensioner has no vested right to his pension; the legislature which created it can recall its bounty at its discretion (22 Am. and Eng. Ency., 658). The act of 1912 taken as a whole shows a clear legislative purpose to allow no pension except to those disabled by reason of service in the department where the disability was contracted through such service, and to commit to the discretion of the board the question, what existing pensions should be transferred to the new roll."

We have pointed out heretofore that all the pension installments which accrued under the Miller Law, as in force prior to the amendment in July, 1935, had been paid in full.

The case of *Passaic National Bank & Trust Company* v. *Eelman*, 116 N. J. Law, 279, 183 A. 677, involved a retire-

ment pension like the one involved herein, and the court points out that the obligation to pay the periodic installment of pensions continues only by force of the statute, and that the legislature may repeal or modify it and thus relieve itself of payments which might arise *in futuro*. This we contend is the effect and the result sought by the passage of the Miller Law in 1935.

The court, in distinguishing between past due or accrued installments where rights vest and future installments of pensions where no rights vest said, on page 680 (183 Atl.):

> "* * * The rule is that compulsory deductions from the salaries of government employees, by the authority of the government, for the support of a pension fund, creates no contractual or vested right between such employees, nor those claiming under them, have any rights except as are conferred by the statute creating and governing the fund. But where the pension installments mature, the right of the pensioner to payment thereof vests. *Plunkett* v. *Board of Commissioners of Hoboken*, 113 N. J. Law 230, 173 A. 923, affirmed 114 N. J. Laws 273, 176 A. 341; *Pennie* v. *Reis*, 132 U. S. 464, 10 S. Ct. 149, 33 L. Ed. 426. This is an obligation imposed by the subsisting statute maintaining and governing the pension fund, and logically falls into the category of obligations enforceable in an action of debt at the common law."

With reference to the termination of the right to future installments of pensions, the court said, on page 680 (183 Atl.):

> "While the pension statute subsists, the obligation to pay the periodic installments continues by force thereof. I can perceive no rational basis for a distinction, in respect of this special execution statute, between installments payable under the Pension Act and a contract of hire. The obligation to pay the pension is fixed while the statute exists. While the Legislature may repeal or modify the act, and thus

terminate the pensioner's right to unaccrued installments, so may the private employer terminate the contract of hire for an indefinite term, and thus relieve himself of obligations to arise *in futuro*. But the installments of salary or wages that may accrue while the contract subsists are nevertheless subject to this form of execution."

In the case of *Macfarland* v. *Bieber*, 32 App. Cases D. C. 513, the facts disclose that a fireman voluntarily retired to accept the provisions of a firemen's retirement fund pension act. After his retirement, the act was amended to provide that persons who had retired must undergo medical examination to determine whether or not such pension should be continued in whole or in part. After the amendment became effective, the petitioner was directed to appear for examination pursuant to the amendment, and upon his failure to appear his pension was terminated. He thereupon sued, claiming that he had a vested right in the pension. In passing upon this proposition, the court stated (p. 518):

"The sole question presented by the record in this case is whether or not appellee acquired such a vested right in the pension granted by the act of Congress as could not be devested by a subsequent act of Congress."

After discussing and citing with approval *Pennie* v. *Reis*, 132 U. S. 464, the court, on page 520, said:

"In the case at bar, it is contended by counsel for appellee that the above case is not directly in point, and that here the contingency necessary to give appellee a vested property right in the fund had happened before the passage of the act of Congress requiring pensioners to subject themselves to medical examination, and that, having vested, it was beyond the power of Congress to destroy that right. With this contention, we cannot agree. The contingency in

the case at bar which gave appellee a property right in the fund in question was one continuing by the grace of Congress, subject to be discontinued or terminated at any time by Congress. His rights in the premises were not different or superior to those of a pensioner under the general pension laws of the United States. Referring to military pensioners, the court in *United States* v. *Teller*, 107 U. S. 64, 27 L. Ed. 352, 2 Sup. Ct. Rep. 39, said: 'No pensioner has a vested legal right to his pension. Pensions are the bounties of the government, which Congress has the right to give, withhold, distribute, or recall at its discretion.'"

Continuing, on page 521, the court said:

"A pension is not granted because of any property right the pensioner has or may acquire in it, but purely as an act of gratitude from the bounty of the government. The liability of the government to appellee was measured by the amount it owed him under existing law at the time Congress, by subsequent act, provided that further payments should cease upon his failure to comply with its provisions. Any amount due appellee at the time of the happening of the event (the making of the order discontinuing his pension), had vested, and could not be withheld. In this respect, the case at bar does not differ from the California case above cited. There, the right to the insurance vested at the death of the insured, providing the law was still in force. The whole of the amount of the insurance at once became due and payable. Here, all that had become vested was the amount of the pension due and payable on the date of its discontinuance by the order of the commissioners."

Congress passed a like pension act for policemen of the District of Columbia, and in *Rudolph* v. *U. S.*, 36 App. Cases D. C. 380, the court was called upon to determine whether or not the pension statute was contractual and whether the person retired had vested rights thereunder that could not be impaired by subsequent amendments.

In holding that the pensions were not contractual, the court, on page 384, said:

> "While the statute in this instance does not rise to the dignity of a contract, it partakes of the nature of a contract to the extent that it confers a bounty or gratuity in the form of a pension as an inducement for entering the service, and remaining therein for a given period of time. The statute differs from a contract in that the government may withdraw the benefits conferred at any time it may deem advisable, after a party enters the service, either before or after the right to a pension accrues. *Macfarland* v. *Bieber*, 32 App. D. C. 513. It also follows that, while there is no vested right in a pension which cannot be devested by the mere exercise of the legislative will, if relators have any rights, they are vested ones so long only as the statute in question remains in force and unchanged, subject to be devested at any time that Congress may desire."

Appellants cite California cases in support of their contention that the courts of California are not in accord with the general rule that pensions are mere bounties, and not subject to the control of the legislature.

The most recent of the California cases is *Casserly* v. *City of Oakland*, 6 Cal. (2d) 64, 56 P. (2d) 237. It appears in that case that the fund out of which the pensions were paid was made up in part by contributions of the pensioners. Nevertheless, the court held that the amount of the pension received on retirement was not vested so as to prevent a subsequent reduction.

Appellants cite the case of *Lage* v. *City of Marshalltown*, 212 Iowa, 53, as holding that a similar statute to the statute involved herein creates vested contractual rights. This decision in no way supports that contention. The facts differ materially from those in the case at bar. In the *Lage* case, the pension law under which plaintiff claimed

money was still in full force and effect, never having been revised, repealed or amended, and the only question involved was the right of the plaintiff to recover in *assumpsit* for a past due pension installment unpaid because of the failure of the city to make the necessary tax levy for that purpose.

The court held that inasmuch as the right to the payment of an installment of a pension was not based upon a contract, that such action would not lie and that the remedy was in mandamus to compel the levy of a tax for pension purposes.

Appellants cite the case of *State ex rel. Stafford* v. *State A. & I. Board,* 219 Wis. 31, in support of their theory that pensions cannot be reduced by a subsequent statute without impairing the obligation of a contract created under the prior statute. An examination of this Wisconsin case discloses that this question was in no way before the court. There was no second statute which it was claimed impaired the obligation of a prior one. The only point involved was whether or not the pension fund was liable to the estate of a deceased employee for the amounts the employee had paid into the fund during his lifetime. The court held that the fund was discharged from any liability upon the death of the contributor.

Another case cited by appellants in support of their theory of vested rights in pensions is *Retirement Board* v. *McGovern, et al.,* 316 Pa. 161. The case states that where the pension is payable out of a contributed reserve retirement system the law is different. On this point the court on page 170 said:

> "Where an allowance is made out of hand, gratuitously, and purely for past services, by the government, it is a pension, with all the attributes of a pen-

sion; but where the employee contributes a part of his salary or wages with a sum from the State or county under a *quasi* contractual relationship with the municipality or State, creating a contributed reserve retirement system, the results are different, retirement pay made therefrom is not a pension; the contributions by the government, from their very nature, must be viewed in a different light."

The case of *Fellows, Attorney General* v. *Connelly,* 193 Mich. 499, cited by appellants, we respectfully submit, throws no light whatsoever upon the issues in the case at bar. The effect of subsequent acts of the general legislature was in no way involved. The point before the court was the legality of an act requiring contributions from teachers to a pension fund.

Renz v. *Hibbing Firemen's Relief Association,* 186 Minn. 370, cited by the appellants as a case construing a similar statute and as holding that a vested right is created by such statute, we submit does not support such a contention. First, because the pension fund there involved was one to which the pensioner contributed, and second, because it did not involve a revision or change in a pension statute. The only question in that case was whether the pension board under its by-laws, which provided, among other things, "trustees shall have power to wholly revoke and annul the same whenever the physical condition which was the cause of the pensioning of such member, no longer exists" had the power to revoke or annul a disability pension previously allowed, and to require that the pensioner prove that his physical condition was such as to entitle him to continue to receive the pension. The court held that the burden of proving that there had been a change in the pensioner's condition warranting a revocation of the pension was on the trustees and his pension could not

be taken away from him without giving him an opportunity to be heard.

Kavanagh v. *Board of Police Commissioners*, 134 Cal. 50, cited by appellants, is a case involving a pension where the particular payment was past due and unpaid when the statute was amended. It is conceded that there were no past due and unpaid installments of pensions when the Miller Law became effective.

Trotzier v. *McElroy*, 182 Ga. 719, involves a pension payable out of a fund to which the petitioner had contributed one per cent of his salary during the time he was employed, whereby, as the court points out in the quotation on page 724, "the right acquired by the firemen are analogous to those possessed by members of mutual benefit societies (28 Cyc. 555)."

To the same effect is *Roddy* v. *Valentine*, 268 N. Y. 228, cited by appellants. There the pensioner had made contributions into the fund from which the pension was paid. Furthermore the case did not involve the right of the legislature to reduce a pension. The New York law took away the entire pension from the pensioner while he was in a public employment after retirement.

Bowler v. *Nagel*, 228 Mich. 434, cited by appellants, merely holds that the municipality had not the power to provide old age pensions for employees; that this authority must be conferred by statute.

In *Matter of Mahon* v. *Board of Education*, 68 N. Y. App. Div. 154, cited by appellants, the only point involved was the validity of an act conferring a pension upon teachers who had resigned before the pension was created.

Mead v. *Acton*, 139 Mass. 341, involves the validity of an act of the State of Massachusetts providing for the

payment of annuities to Civil War soldiers. The court held that the statute was unconstitutional because it authorized the raising of money by taxation for the exclusive benefit of individuals and appropriates for a private purpose money which can only be used for a public purpose.

It is therefore apparent that the decisions of the several states relied on by the appellants do not sustain their claim to contractual vested property rights in the future installments of pensions under the Miller Law as it existed prior to the act of July, 1935.

State decisions holding that pensions based on contracts are subject to the inherent right of the legislature to modify.

Many of the questions raised in the cases decided in the various states as well as those decided by the United States and Illinois courts were given consideration in the exhaustive opinion of the Texas Supreme Court in the recently decided case of *City of Dallas* v. *Trammell*, 101 S. W. (2d) 1009 (March, 1937).

That case involved a voluntary retirement pension law of Texas.

The original statute in the Texas case, like Section 3 of the Miller Law, permitted employees to retire after twenty years of service. The law provided for a fund, which was maintained by appropriations from the general revenue of the City and by one per cent deduction from the compensation of the employee. Upon retirement, the City was required to pay from the fund monthly payments of one-half of the salary received by the employee at the time of his retirement. The plaintiff Trammell, after complying with all the conditions applicable to him, retired and was granted a pension of $183.33 per month

under the applicable provisions of the law at the date of his retirement. He was paid this pension until the Act was amended. Pursuant to the amendment, his pension was reduced to $72.36 per month.

It was contended that the amendment or amended law impaired the obligation of plaintiff's contract to receive the pension provided for in the original Act. The gist of plaintiff's contention is that having accepted the benefits of the pension law applicable at the time he entered the service and having complied with the terms of the law and having retired after complying with all of the conditions applicable to him and having been granted a pension of $183.33 per month, he acquired a vested right in the pension fund to the amount of $183.33 per month, and that the subsequent legislation which reduced this pension was in violation of his constitutional rights.

It appears that Texas has held that pensions are not gratuities or donations but are a part of the contract of employment. The court held that plaintiff's right to receive the pension made payable under the original Act is predicated upon the anticipated continuance of that law and is subordinate to the right to abolish pensions payable thereunder, and in so holding reviewed many decisions of the courts of the various States and cited with approval the ruling of the Illinois Court in the case at bar.

The court held, on page 1011, quoting from its decision in *Byrd* v. *City of Dallas,* 118 Tex. 28, as follows:

> "The law pertaining to such employment is necessarily a part of the contract of employment and is read into the contract as fully as though it had been actually incorporated therein. * * * When an officer or employee coming within the statute is employed and evidences his assent to the pension scheme, he thereupon has a binding contract with his employer

for the stipulated salary and likewise to be 'entitled to participate' in the fund upon the terms prescribed. The *right to participate in such fund* is therefore not a gratuity or donation in any sense. It is as much a part of the agreed compensation as is the monthly stipend."

Proceeding to discuss the question in the case then under consideration, the court said:

"As we view the matter the true question involved is this: Does the employee, after retirement, have a vested right to participate in the pension fund to the extent of the full amount of the monthly installments granted to him at retirement; that is, does he have a vested right in future installments which cannot be affected by subsequent legislation tending to diminish the amount of such installments? Putting the matter in somewhat different language, we may properly inquire if the right which the employee has to participate in the pension fund, acquired by virtue of his contract, imposes upon the city and the Legislature of the state (the source of the city's power and authority in a matter of this kind) the inviolable duty of maintaining a pension fund of such proportions as will guarantee the right to defendant in error and others having equal rights with him to participate to the full extent of the monthly amounts previously awarded to them at the time the right to participate accrued? In other words, is the Legislature without constitutional power to repeal the laws upon which the pension system of the City of Dallas is based, or to modify their provisions in such way as to diminish the pensions payable to those who have become qualified to receive them so long as any one who has been granted a pension shall live?"

The court stated that there were two lines of decisions, one of which Dillon on Municipal Corporations points out, holds that when the particular event has happened upon which the money or a part of it is to be paid, the beneficiary of the pension under the pension system acquires a

vested right and it is not competent for the legislature or any other authority to deprive him of that vested right. The court points out that this statement is deduced from certain language in the opinion in *Pennie* v. *Reis,* 132 U. S. 464, 32 L. ed. 426, and states on page 1012:

> "This language, however, must be interpreted in the light of the particular facts in the case of *Pennie* v. *Reis,* and in other cases where it has frequently been followed. Under various laws of California governing the granting of pensions to policemen and other employees or to their beneficiaries, such pensions have usually, if not invariably, become payable in a lump sum, or as a fixed amount payable in monthly installments. This was true in the case of *Pennie* v. *Reis.* The necessary consequence of such laws is to make the pension a liquidated demand upon the retirement or death of the employee, and of course the right to participate in the existing fund to the extent of the particular or fixed liquidated sum is a vested one."

In the case at bar the pension provided was not for any lump sum, but was an annual one.

The court continued, on page 1012, as follows:

> "There is another line of decisions to the effect that, as pensions granted to employees of the state or its municipalities are purely of statutory origin, the employees, in making contracts of employment under which the right to participate in the pension fund accrues, do so in contemplation of the reserved right of the Legislature to amend or to repeal the laws on which the pension systems are founded; and therefore the right to participate in the fund, even though arising from the contract, is based upon the anticipated continuance of existing laws. Under this theory, there can be no vested interest in future installments of pensions which will prevent the Legislature from repealing the law upon which the system is founded, or modifying the law in such way as to diminish the amount of future monthly payments. • • •

> In our opinion, the rule that the right of a pensioner to receive monthly payments from the pension fund after retirement from service, or after his right to participate in the fund has accrued, is predicated upon the anticipated continuance of existing laws, and is subordinate to the right of the Legislature to abolish the pension system, or diminish the accrued benefits of pensioners thereunder, is undoubtedly the sound rule to be adopted." (Page 1013.)

The court in its decision discussed the Illinois cases on pensions, including the case now before this court, and said in reference to those decisions that it was convinced that the rule announced in them rested upon a sounder basis than decisions of courts which were apparently to the contrary.

In this same case the court also pointed out notwithstanding the so-called "California rule" that in the most recent pension case decided by the Supreme Court of California, *Casserly* v. *City of Oakland,* 56 P. (2nd) 237, 6 Cal. (2nd) 64, the court held that pensions payable in installments might be reduced by the legislature even though the pension was a part of the contract of employment.

In this same case, the Texas court had occasion also to refer to the case of *State ex rel. Holton* v. *City of Tampa,* 119 Fla. 556, 159 So. 292. In that case the Florida court had before it the constitutionality of an Act which reduced the amount of a pension previously awarded to a retired fireman under a pre-existing Act, and held that such law was not unconstitutional. It pointed out that while it recognized that a retired employe had a vested right to participate in an existing pension fund, nevertheless that such right was subject to modification stating at page 293 (So.):

> "But except in a case admitting of no other construction, a statutory retirement provision will not be construed as a contractual limitation binding on the

> legislative prerogative to fix the amount of retirement pay from time to time, so long as entire deprivation is not thereby attempted under the guise of regulation of the amount of compensation."

Appellants in the case at bar seek to have this Court hold that future installments of pensions may not be reduced. But it is evident that the overwhelming weight of authority and reason is to the effect that a legislature has the right to reduce future installments of a pension, whether the court considered the pension the result of the grant of a bounty, the entering into of a contractual relationship, or the establishment of a legislative status.

In view of the fact that the courts have so universally and for so many years recognized this legislative prerogative to modify these various types of pensions and have by their decisions approved modifications of them, we hardly need point out to the court that a decision such as is sought by the appellants in this case will disrupt the settled law of all the States and will have a widespread and disastrous effect.

It is obvious from an examination of the cases which we have cited that pension reductions have been made recently in many States and sustained and that such States have predicated the administration of their affairs on the validity of such laws.

II.

The Miller Law is an offer of a bounty and not an offer to contract.

This Court has recognized the fact that a State legislature may make an offer of bounty as distinguished from an offer to contract and that in such a situation the fact that one individual or one of a class of persons to whom that offer of bounty is made suffers certain detriments in order to qualify for such a bounty, does not vest any rights to that bounty.

Christ Church v. *County of Philadelphia*, 65 U. S. 300; 16 L. ed. 602.

Welch v. *Cook*, 97 U. S. 541, 24 L. ed. 1112.

Grand Lodge of the State of Louisiana v. *City of New Orleans*, 166 U. S. 143, 41 L. ed. 951.

Salt Manufacturing Company of East Saginaw v. *East Saginaw*, 80 U. S. 373, 20 L. ed. 611.

Wisconsin and Michigan Railway Company v. *Powers*, 191 U. S. 379, 48 L. ed. 229.

Stanislaus County v. *San Joaquin, etc. Company*, 192 U. S. 200, 48 L. ed. 406.

The case of *Rector, Christ Church Hospital* v. *County of Philadelphia*, 65 U. S. 300, 16 L. ed. 602, involved the constitutionality of a subsequent act which subjected to taxation certain hospital property which had been exempted from taxation by a previous act. The previous act which exempted the hospital property from taxation provided

> "that the real property, including ground rents, now belonging and payable to the Christ Church Hospital, in the City of Philadelphia, so long as the same

shall continue to belong to the said hospital, shall be and remain free from taxes."

It was contended that the act above quoted was perpetual, and that the act itself was in effect a contract. On the question of the act being a contract, the court, on page 604 (L. ed.), said:

> "This concession of the Legislature was spontaneous, and no service or duty, or other remunerative condition, was imposed on the Corporation. It belongs to the class of laws denominated *privilegia favorabilia*."

In the case at bar the State was in no way obligated to provide the $1,500.00 annual pension. It could have retired teachers without making any provision whatsoever in the retiring act for this additional pension.

In the *Christ Church* case it was pointed out that no service, duty or remuneration was imposed upon the hospital. In the case at bar the Miller Act made no requisition upon any teacher, either by way of contribution or by imposition of additional or different duties or services.

The act under consideration in the *Christ Church* case exempted property from taxation so long as the same should continue to belong to said hospital. The act under consideration in the case at bar, provided that the pension was to be paid for life. It cannot be contended that the grant in the one was any less perpetual than that in the other. On the question of the perpetuity of a grant, the court, on page 604 (L. ed.), said:

> "All laws, all political institutions, are dispositions for the future, and their professed object is to afford a steady and permanent security to the interests of society. Bentham says 'that all laws may be said to be framed with a view to perpetuity; but perpetuity is not synonymous to irrevocable; and the principle

on which all laws ought to be, and the greater part of them have been established, is that of defeasible perpetuity—a perpetuity defeasible by an alteration of the circumstances and reasons on which the law is founded'."

As to the nature of the privilege granted, the court, on page 604 *id.*, said:

"It is in the nature of such a privilege as the Act of 1833 confers, that it exists *bene placitum* and may be revoked at the pleasure of the sovereign."

We submit that the pensions provided in the Miller Law are even to a greater extent spontaneous; that the act belongs to the class of laws denominated *privilegia favorabilia,* as it is undoubtedly a special favor granted by the legislature to teachers, a privilege that the State was under no obligation or duty to grant.

In *Welch* v. *Cook, supra,* a statute exempted from taxation for ten years all property in the District of Columbia employed for manufacturing purposes. The statute was subsequently repealed and property used for such purpose was taxed.

The Supreme Court held that there was no impairment of contract and that the original contract was merely the bounty of the government.

In *Grand Lodge of the State of Louisiana* v. *City of New Orleans,* 166 U. S. 143, 41 L. ed. 951, the legislature, by an Act of 1855, exempted the hall of said corporation from city and parish taxation so long as it was occupied by said lodge. In 1879, a new Constitution was adopted by the State, which provided among other things that property of all charitable institutions be exempt from taxation provided the property so exempt be not used or leased for the purpose of private or corporate profit or income. Plain-

tiff rented out part of the property for commercial purposes. The local taxing authorities thereupon taxed the property of the plaintiff on the theory that under the Constitution it was not exempted from taxation. The corporation complained on the ground that the Act of 1855 constituted a contract between the State and the corporation and therefore the Constitution impaired the obligation of the contract; that if the Constitution be given the effect contended for by the local taxing authorities that it constituted an impairment of contract and divested them of vested rights. The court, on page 952 (L. ed.), said:

> "To make such a contract, however, there is the same necessity for a consideration that there would be if it were a contract between private parties. If the law be a mere offer of a bounty, it may be withdrawn at any time, notwithstanding the recipients of such bounty may have incurred expenses upon the faith of such offer."

The court held that the Act in question was one which the legislature might properly enact as a matter of public policy and in aid of a beneficent purpose, and that it was a mere gratuity or bounty which it was competent at any time to terminate and that it was so terminated by the Constitution of 1879.

The case at bar is similar to the *Grand Lodge* case in that in both instances the legislature was enacting an act of public benefit. As the court pointed out in its discussion in the *Grand Lodge* case, in this type of legislation the rule is that the legislature presumably reserves the right to alter such legislation as and when it sees fit. Being acts of public benefit, these are acts which are in the nature of bounties. The only cases where acts of this type have been held to create contractual relationships which cannot

be impaired without violating the Constitution of the United States have been cases where the legislature contracted by way of special charter or statute with individuals in order to induce such individuals to do something which the State could not otherwise compel them to do. In the case at bar there was no necessity for the State to induce the teachers to retire at any certain age. It might at any time have passed a law providing that they should be compulsorily retired at a given age.

Phelps v. *Board of Education of Town of West New York*, 81 L. ed. 388.

Groves v. *Board of Education* (Appendix, p. 102).

There was, therefore, no benefit accruing to the State as a result of offering the pensions in question. In the absence of the necessity to offer the teachers something in order to accomplish their retirement at a certain age, the statute in the case at bar, like that in the *Grand Lodge* case, should be construed as an offer of bounty rather than as an offer of contract.

A much cited case on the subject of whether or not an act of the legislature is an offer of a bounty or of a contract is the case of *Salt Mfg. Co.* v. *East Saginaw, supra.* This case involved an amendment to an Act of the General Assembly of the State of Michigan providing that all companies or corporations formed or which might be formed for the purpose of boring for and manufacturing salt in the State, and any and all individuals engaged or to be engaged in such manufacturing, should be entitled to an exemption from taxation of all property used for such purposes and a bounty of 10 cents for each and every bushel of salt manufactured from water obtained from boring in the State, provided that at least 5,000 bushels of salt were manufactured. In the bill filed it was urged

that the Salt Manufacturing Company was induced to form a corporation, perform experiments, erect necessary buildings and procure requisite machinery and that it drilled and found brine of sufficient strength to warrant the company in proceeding to manufacture salt. It did manufacfacture 6,358 barrels of salt. Later the Act was amended so as to limit the tax exemption to five years from the date of the organization of the company and limit the bounties to be paid to any one individual to the sum of $5,000.00. The court, on page 613 (L. ed), stated the issue involved in the following language:

> "The question in this case is: whether any contract was made at all, and, if there was, whether it was a contract determinable at will or of perpetual obligation?"

The court, in determining this issue, said at page 614 (L. ed):

> "Had the plaintiff in error been incorporated by a special charter, and had that charter contained the provision that all its lands and property used in the manufacture of salt should forever, or during the continuance of its charter, be exempt from taxation, and had that charter been accepted and acted on, it would have constituted a contract. But the case before us is not of that kind. It declares, in purport and effect, that all corporations and individuals who shall manufacture salt in Michigan from water obtained by boring in that State, shall be exempt from taxation as to all property used for that purpose and, after they shall have manufactured 5,000 bushels of salt, they shall receive a bounty of ten cents per bushel. That is the whole of it. * * * There is no obligation on any person to comply with the conditions of the law. It is a matter purely voluntary; and, as it is purely voluntary on the one part, so it is purely voluntary on the other part; that is, on the part of the Legislature, to continue, or not to continue the law."

In the *Salt* case the court pointed out that so far as the legislature was concerned, it had voluntarily made the offer; and as far as anybody accepting the offer was concerned, they proceeded without compulsion, and that in view of the fact that both parties had acted purely voluntarily they were also at liberty to recede at any time. Likewise in the case at bar the group of teachers who had not reached the age limit had the choice of continuing to teach or of accepting the additional pension. There was no compulsion either to continue to teach or to accept the additional pension. This being so, it must follow from the reasoning of the *Salt* case that the Illinois legislature was under no compulsion to continue the law as originally enacted.

The case of *Wisconsin* v. *Michigan Railway Company, supra,* involved another situation where a railroad company was operating under a statute which exempted it from taxation in certain respects and where such exemption was taken away by a subsequent statute. The railroad company contended that the repeal of the exemption impaired the obligation of a contract created by the original act. In discussing the issues before it, the court said, on page 231 (L. ed.):

> "The first and main question, then, is whether the act of 1893 purported to make an irrevocable contract with such railroad as might thereafter comply with its terms. The question is pretty well answered by a series of decisions in this court. A distinction between an exemption from taxation contained in a special charter, and general encouragement to all persons to engage in a certain class of enterprise, is pointed out in *East Saginaw Salt Mfg. Co.* v. *East Saginaw,* 13 Wall. 373, 20 L. ed. 611, S. C. 19 Mich. 259, 2 Am. Rep. 82. In earlier and later cases it was mentioned that there was no counter-obligation, service, or detri-

ment incurred that properly could be regarded as a consideration for the supposed contract. *Christ Church* v. *Philadelphia County*, 24 How. 300, 16 L. ed. 602; *Tucker* v. *Ferguson*, 22 Wall. 527, 22 L. ed. 805; *Grand Lodge, F. & A. M.* v. *New Orleans*, 166 U. S. 143, 41 L. ed. 951, 17 Sup. Ct. Rep. 523. See *Tomlinson* v. *Jessup*, 15 Wall. 454, 459, 21 L. ed. 204, 206. But whatever the ground, thus far attempts like the present to make a contract out of the clauses in a scheme of taxation which happen to benefit certain parties have failed. See further, *Welch* v. *Cook*, 97 U. S. 541, 24 L. ed. 1112, and *Manistee and N. E. R. Co.* v. *Commissioner of Railroads*, 118 Mich. 349, 76 N. W. 683, in which the state court deals with this very act.

It may be that a state, by sufficient words, might bind itself without consideration, as a private individual may bind himself by recognizance or by affixing a seal. A state might abolish the requirement of consideration altogether for simple contracts by private persons, and it may be that it equally might dispense with the requirement for itself. But the presence or absence of consideration is an aid to construction in doubtful cases,— a circumstance to take into account in determining whether the state has purported to bind itself irrevocably or merely has used words of prophecy, encouragement, or bounty, holding out a hope but not amounting to a covenant.

In the case at bar, of course, the building and operating of the railroad was a sufficient detriment or change of position to constitute a consideration if the other elements were present. But the other elements are that the promise and the detriment are the conventional inducements each for the other. No matter what the actual motive may have been, by the express or implied terms of the supposed contract, the promise and the consideration must purport to be the motive each for the other, in whole or at least in part. It is not enough that the promise induces the detriment or that the detriment induces the promise, if the other half is wanting. If we are to deal with this proviso in a general tax law as we should deal with an alleged simple contract, while, no doubt, in some cases be-

> tween private persons the above distinctions have not been kept very sharply in mind (*Martin* v. *Meles*, 179 Mass. 114, 117, 60 N. E. 397), it is clear that we should require an adequate expression of an actual intent on the part of the state to set change of position against promise before we hold that it has parted with a great attribute of sovereignty beyond the right of change. See *Vicksburg, S. & P. R. Co.* v. *Dennis*, 116 U. S. 665, 668, 29 L. ed. 770, 771, 6 Sup. Ct. Rep. 625. Looking at the case in this way, then, we find no such adequate expression. No doubt the state expected to encourage railroad building, and the railroad builders expected the encouragement; but the two things are not set against each other in terms of bargain. See *Covington* v. *Kentucky*, 173 U. S. 231, 238, 239, 43 L. ed. 679, 682, 19 Sup. Ct. Rep. 383."

In the opinion above quoted from, the court has taken occasion to point out certain basic differences between a statute which constitutes an offer to contract and a statute which constitutes an offer of bounty. One of the distinctions drawn, and which we think applicable to the case at bar, is the distinction made between a statute which grants a special charter to an individual and a statute which makes an offer to persons in a certain class of enterprise. Where the offer is to persons engaged in a certain class of enterprise, it is held that the offer is not one of contract. So, in the case at bar, where the offer is to persons engaged in a certain class of enterprise, to-wit: in teaching, rather than to individual teachers, we submit that the offer is not an offer to contract.

A further distinction pointed out by the court in the above opinion is that in cases where the statute is deemed to be an offer of contract, the statute should contain an adequate expression of an intent of the legislature to make a contract rather than to make a law. In cases where there is no adequate expression of an intent to enter into a

specific contract, the courts hold that the statute is not an offer to contract but a declaration of legislative policy.

So, in the case at bar, since there has been no expression on the part of the legislature of an intent to divest itself of sovereign power, therefore we submit that the statute in question does not constitute an offer of the legislature to irrevocably bind itself to pay pensions.

Another case in which it was contended that the statute constituted an offer, which when acted upon ripened into a contract, is the case of *Stanislaus County* v. *San Joaquin, supra.* The act of 1862, which it was contended constituted the offer, provided that every company organized as provided therein should have the power granted therein to establish, collect and receive rents, water rents, or tolls, which should be subject to regulation by the board of supervisors of the county or counties in which the works were situated, but which should not be reduced by the supervisor so low as to yield to the stockholders less than 1½% per month upon the capital actually invested.

In 1885, the legislature passed an act providing for the fixing by the board of supervisors of the county of the rates to be collected by water companies. Section 5 of the act authorized the various boards of supervisors to regulate and control water rates that might be charged in their respective counties. The act provided that said boards in fixing such rates should as soon as possible adjust them so that the net annual receipts and profits of said companies so furnishing such water to individuals should be not less than six nor more than eighteen per cent. upon the value of the canals, ditches, flumes and all other property actually used and useful to the appropriation and furnishing of such water. It appeared that the water company at the time of the passage of the last act, had

actually invested under the authority of the act of 1862, a capital amounting to $971,113.13 in money in the purchase and construction of its canals and other property actually used in furnishing the water, and that the property was actually worth that amount.

It is alleged that the amendatory act was in violation and repugnant to the provisions of the Constitution of the United States. The court said, at page 410 (L. ed.):

> "The question then arises whether language such as is contained in the third section of that act, and which is set forth in the foregoing statement of facts, amounts to a contract, to be protected by the Constitution of the United States. We think it does not.
>
> It seems to us that language of this nature cannot properly be construed as a promise or pledge that the limitation as to rates may not be altered at any time when, in the judgment of the legislature, it may be proper so to do. Water rates which might have been perfectly reasonable at the time of the passage of the act of 1862, although amounting to 1½ per cent per month upon the capital actually invested, might, in the course of years, become exceedingly burdensome to those who used the water, and amount to a very unreasonable compensation to the company for the water it sold."

When the Legislature of Illinois passed the provision for the additional pension of $1,500 per annum to retired teachers, conditions were different than they were in 1935. Not only was the early expense of $12,000 per annum increased a hundredfold when the year 1935 arrived, but the general financial condition of the country was vastly different, so that what might have been a light burden in 1926 became an extremely onerous one in 1935. It is no more reasonable to suppose that the Legislature of Illinois intended to part with its sovereign power in the matter of control of pensions by fixing an irrevocable amount by

an irrevocable contract than it was to suppose that it was the intention of the Legislature in the *Stanislaus* case that companies availing themselves of certain statutes should have the power forever to have a yield on capital invested in a certain fixed amount, regardless of the times or conditions.

Another line of cases which we submit leads irresistibly to the conclusion that in the case at bar the Miller Act was an offer of bounty and not an offer to contract is that line of cases which hold that public officers and employes acquire no vested rights to the incidents of their positions, such as salary, duties and tenure.

Butler v. *Pennsylvania,* 10 How. 402, 13 L. ed. 472.
Newton v. *Mahoning County Commissioners,* 100 U. S. 548, 25 L. ed. 710.
Crenshaw v. *United States,* 134 U. S. 99, 33 L. ed. 825.
Mississippi v. *Miller,* 276 U. S. 174, 72 L. ed. 517.
Phelps v. *Board of Education,* 81 L. ed. 388.

In the *Butler* case, *supra,* the court had occasion to say, on page 478 (L. ed.):

> "The contracts designed to be protected by the tenth section of the first article of that instrument (the Constitution) are contracts by which perfect rights, certain definite, fixed private rights of property, are vested. These are clearly distinguishable from measures or engagements adopted or undertaken by the body politic or state government for the benefit of all, and from the necessity of the case, and according to universal understanding, to be varied or discontinued as the public good shall require."

And again, on page 479:

> "We have already shown that the appointment to and the tenure of an office created for the public use,

and the regulation of the salary affixed to such an office, do not fall within the meaning of the section of the Constitution relied on by the plaintiffs in error; do not come within the import of the term 'contracts,' or, in other words, the vested, private personal rights thereby intended to be protected. They are functions appropriate to that class of powers and obligations by which governments are enabled, and are called upon, to foster and promote the general good; functions, therefore, which governments cannot be presumed to have surrendered, if indeed they can under any circumstances be justified in surrendering them."

The doctrine enunciated in the *Butler* case has been followed in all cases presented to this court down to and including the recently decided case of *Phelps* v. *Board of Education, supra.* In that case the court pointed out that the prohibition against reduction of salaries in the act of 1909 passed by the New Jersey Legislature was but a regulation of the conduct of the Board of Education and not a term of a continuing contract of indefinite duration. This conclusion was arrived at in spite of the fact that there was an express provision in the New Jersey statute prohibiting the Board of Education from reducing the salary of a teacher during his tenure of office. It should be noted that the Miller Act contained no provision, express or otherwise, to the effect that the pension granted by that act should not be reduced.

Can it logically be argued that although it is in the power of the legislature to change the fixed compensation of a teacher and to destroy the tenure of his office, that it is not in its power to change a pension granted to that same teacher? Surely, it cannot be logically assumed that the legislature intended to contract itself into a perpetually binding obligation to pay pensions of a certain sum to teachers to whom it was under no obligation or necessity

to give a pension, when the same results might be obtained without giving pensions.

The case at bar should be distinguished from a situation where it is necessary to make an offer of some sort in order to accomplish a desired result; that is, in order to have some benefit accrue to the offerer. In the case at bar the desired result, namely, the retirement of teachers at a certain age, could have been accomplished without any offer on the part of the State by the simple expedient of passing a law compulsorily retiring them without the Miller pension. This being so, it seems manifest that the offer was an offer of bounty and, as such, was subject to modification by the state.

III.

There is no consideration moving from appellants.

Nowhere in the record of this case is there any evidence that the provisions of the Miller Act induced any one of the appellants to resign at the time he or she did. Nowhere in the record does it appear that the compensation provided for by the Pension Act of 1909 [the Teachers' Pension and Retirement Fund Act] was not in itself a sufficient inducement to these appellants to retire when and as they did.

But even if such evidence was present in the record, it is submitted that the action taken by the appellants did not constitute such consideration as would support a valid and binding contract.

Appellants are somewhat vague as to what consideration, if any, they furnished which established a contractual right to an irrevocable and irreducible pension under the terms of the Miller Act. On page 42 of their brief, they

suggest there are three elements which might be construed as consideration. They confuse the consideration supposed to be furnished by them for contract purposes with what they say were the purposes of granting the pension.

They state, on page 42, of their brief:

> "In point I of this brief three elements, any one of which constituted consideration for a contract, were suggested. They are that the annuities for which appellants qualified were granted, (1) to insure future satisfactory services in the Chicago schools by teachers already in that employment, or who might thereafter enter it—by the reduction of turn-over; (2) to induce the giving up of active teaching positions carrying larger compensation by those whom it was thought desirable to replace by younger teachers; and (3) as compensation for services to be rendered, which compensation was to be withheld until a future determinative date based upon the age of the teacher."

Certainly if the pensions were granted to insure future satisfactory service that fact involved no consideration given on the part of the appellants. Salaries paid to teachers in the Chicago school system are for satisfactory service both present and future. It was not necessary for the Legislature to induce teachers to render satisfactory service by the passage of the Miller Law as the School Law already provided for their removal in the event that satisfactory services were not rendered (Par. 186, chap. 122, Ill. R. S., 1937).

Appellants vaguely suggest that some consideration is furnished by the fact that teachers are induced to stay in service longer and that as a result the turnover of teachers is reduced. This contention, of course, is inconsistent with their contention to the effect that the teachers were induced by the Miller Act to leave their employment.

The second consideration suggested by appellants is that they were induced by the provisions of the Miller Act to give up active teaching positions carrying larger compensation and were replaced by younger teachers. If this suggestion is interpreted to mean that a benefit accrued to the Board by the fact that younger teachers received smaller salaries than teachers who retired, then we submit the facts refute such a contention. The maximum salary of an elementary school teacher prior to retirement was $1,912.50 (R., 115). Upon retirement she would receive $1,500.00 under the Miller Act and $1,000.00 per annum from the Teachers' Pension and Retirement Fund (Par. 183, Chap. 122, Ill. R. S. 1937). The new teacher entering the service received a salary of $1,127.50 (R., 115). It is obvious, therefore, that the original cost to the Board of one teacher's salary of $1,912.50 is replaced by a cost of one teacher's salary of $1,127.50, plus a cost in the great majority of cases of $1,500.00 for the Miller pension paid to the retired teacher, and that instead of there being a saving to the Board there is an additional expense. The same increased cost results in the case of principals. The number of the latter, it is unnecessary to state, is so small compared to the number of teachers in the system that statements made by counsel as to losses suffered by them on retirement could hardly prove enlightening to the court on the subject of the general situation of the teaching staff.

If, on the other hand, this suggestion is construed to mean that the retiring teachers were induced to give up a larger income for a smaller one and thereby suffered a detriment which was consideration for a contract, it can also be shown that this contention is fallacious.

As has already been suggested, there is no reference in the record to show that any of the appellants was induced to retire because of the provisions of the Miller Act. As a matter of fact the provisions of the Miller Act, we submit, would be an inducement to stay in the service until the time for compulsory retirement had arrived, since the pension awarded to those retiring at the age of sixty-five years was $1,000.00; to those retiring at the age of sixty-six years was $1,100.00, sixty-seven years, $1,200.00; sixty-eight years, $1,300.00; sixty-nine years, $1,400.00, and seventy years, $1,500.00. In this reasoning we are supported by the actuary figures cited by the appellants (R., 70).

Moreover, the regular Teachers' Pension and Retirement Fund act in itself might well have been inducement enough for any of the appellants to retire, as it had been to countless numbers of teachers who had retired prior to the passage of the Miller Act.

Furthermore, as we have previously pointed out, it was in the power of the legislature at any time to provide for the compulsory retirement of teachers at any age. These teachers, therefore, were not surrendering any position in which they had a vested right. They were leaving a position, the tenure limit of which could be changed at any time by the legislature.

In this connection it should be pointed out that those appellants who were over seventy years of age were compulsorily retired by Section 1 of the original Miller Act. It is obvious that the contention that the Miller Act induced them to retire is unsound. They were retired by legislative prerogative.

Likewise it is obvious that the contention is unsound that those of appellants whose applications for retirement

have never been acted upon by the Board of Education were induced to retire by the provisions of the Miller Act, for the reason that it is apparent that those appellants had notice of the fact that the Act was to be amended so as to provide for a compulsory retirement at the age of sixty-five.

The third consideration suggested by the appellants, namely, that the pension was "compensation for services to be rendered, which compensation was to be withheld until a future determinative date based upon the age of the teacher," is difficult to understand, but if counsel means by this to adopt an expression that has been used in a few pension cases as one of the elements on which the courts sustained pension legislation, then it is obvious that the only benefit is the one conferred upon the teacher. No benefit accrues to the offeror and no detriment accrues to the offeree.

IV.

If the Miller Act is to be construed as a legislative contract, this court should interpret the terms of that contract in the light of decisions of the Supreme Court of Illinois made prior to the formation of the contract.

Assuming that a relationship was entered into by the appellants and the appellees which can be designated as a contractual relationship and that from that relationship appellants acquired certain rights, it is the contention of appellees that such a relationship gave to the appellants these rights subject to future divesting of them by the legislature.

It is elemental that any contract which we assume was entered into must be limited to what the contracting par-

ties intended to include in such a contract and what they understood or should reasonably have understood such contract to mean. If this court is to accept appellants' contention that a contract was entered into which gave them a vested right to a pension of Fifteen Hundred Dollars ($1,500.00) annually for life, it must find that the legislature of the State of Illinois intended to make an offer, or did make an offer, of such a pension irrevocably.

At the time of the adoption of the Miller Act the legislature knew that in every decision which the Supreme Court of Illinois had handed down on the subject of pensions of the type being considered in the case at bar the court had held that such pensions were bounties of the state which could be terminated at the will of the legislature.

The legislature knew that the Supreme Court of Illinois had steadfastly held to this interpretation throughout all its decisions in every conceivable factual situation. It had notice of the fact that this doctrine was enunciated as far back as 1905 in the case of *Eddy* v. *Morgan*, 216 Ill. 437, 449, and had been approved in *Ryan* v. *Foreman*, 262 Ill. 175 (1914); *Stiles* v. *Board of Trustees*, 281 Ill. 636 (1917), and *People* v. *Retirement Board*, 326 Ill. 579, 582 (1927); it knew the doctrine had been applied even where employes had been compelled to contribute to the pension fund created for their benefit, *Hughes* v. *Treager*, 264 Ill. 612 (1914); where the statute divesting the pensioners' rights had been passed subsequently to his appointment to office, *Pecoy* v. *City of Chicago*, 265 Ill. 78 (1914); and where the pensioner had actually made application for retirement on a pension prior to the passage of the act divesting him of his rights, *Beutel* v. *Foreman*, 288 Ill. 106 (1919); *People* v. *Hanson*, 330 Ill. 79 (1928).

The Supreme Court of the State of Illinois has adhered to this interpretation of pensions in all cases subsequent to the passage of the original Miller Act, *People* v. *Retirement Board, supra; People* v. *Hanson, supra; McCann* v. *Retirement Board,* 331 Ill. 193 (1928); *Dodge* v. *Board of Education,* 364 Ill. 547; *Raines* v. *Board of Trustees Pension Fund,* 365 Ill. 610.

Appellants knew, or in law are presumed to have known, the law of the state.

We contend that the law as to pensions in the State of Illinois, clear, unequivocal and long established as it was, whether good law or bad law, was an integral part of any contract which the legislature of the state might make regarding pensions.

Where a state becomes a party to a contract through legislative enactment of a statute, this court will interpret the terms of such a contract in the light of the decisions of the Supreme Court of that state made prior to the formation of the contract.

Anderson v. *Township of Santa Anna,* 116 U. S. 356, 29 L. ed. 633.

Ennis Waterworks v. *City of Ennis,* 58 L. ed. 1139, 233 U. S. 652.

Olcott v. *Board of Supervisors,* 83 U. S. 678, 21 L. ed. 382.

Douglas v. *Pike County,* 101 U. S. 677, 25 L. ed. 968.

Great Northern Railway Co. v. *Sunburst Oil and Refining Co.,* 287 U. S. 358, 77 L. ed. 360.

In *Anderson* v. *Township of Santa Anna, supra,* the Township of Santa Anna had voted to buy railroad bonds on July 21, 1866. An act to amend the railroad's charter

and extend its powers was passed February 28, 1867, empowering towns to purchase the bonds of this railroad upon the majority vote of their inhabitants and provided that where such a vote had already been taken that that vote complied with the provision of the statute. Suit was brought by a holder in due course to recover the amount of the bonds. The Circuit Court sustained a demurrer to the bill. Reversed by the Supreme Court of the United States.

It was contended as a defense to recovery in that suit that the Act of 1867 was unconstitutional as creating a municipal indebtedness against the municipality's will expressed in a legal manner. The court, in rejecting this contention, pointed out that a long line of Illinois cases decided prior to the purchase of the bonds in question had held that defective subscriptions of the type in the case at bar might in all cases be ratified where the legislature could originally have conferred the power to subscribe.

After discussing some of the decisions of the Illinois Supreme Court prior to the time that the bonds were purchased, the court said at page 634 (L. ed.):

> "These cases were all determined before the bonds in suit were issued. While they are not analogous in every respect to the one before us, they seem to rest upon the principle that the Legislature, when not restricted by the Constitution, may, by retroactive statutes, legalize the unauthorized acts and proceedings of subordinate municipal agencies, where such acts and proceedings would have been valid if done under legislative sanction previously given. The decision in *St. Joseph Township* v. *Rogers* only gave effect to principles announced by the state court prior to the issuing of the bonds. If, according to the law of Illinois, as declared by its highest court at the time the bonds in suit were issued, the Act of February

28, 1867, was a valid exercise of legislative power, the rights of the purchasers or holders, could not be affected merely by subsequent change of decision. For it is the long established doctrine of this court—from which, as said recently in *Green County* v. *Conness*, 109 U. S. 105 (Bk. 27, L. ed. 872), we are not disposed to swerve—that where the liability of a municipal corporation upon negotiable securities depends upon a local statute, the rights of the parties are to be determined according to the law as declared by the state courts at the time such securities were issued. In *Douglass* v. *County of Pike*, 101 U. S. 677 (Bk. 25, L. ed. 968), the *Chief Justice* said: 'After a statute has been settled by judicial construction, the construction becomes so far as contract rights are concerned, as much a part of the statute as the text itself, and a change of decision is, to all intents and purposes, the same in effect on contracts as an amendment of the law by means of a legislative enactment.' See also *County of Ralls* v. *Douglass*, 105 U. S. 732 (Bk. 26, L. ed. 958); *Olcott* v. *Supervisors*, 16 Wall. 678 (83 U. S. Bk. 21, L. ed. 382); *City* v. *Lamson*, 9 Wall. 477, 485 (76 U. S. Bk. 19, L. ed. 725, 729); *Boyd* v. *Alabama*, 94 U. S. 645 (Bk. 24, L. ed. 302); *Taylor* v. *Ypsilanti*, 105 U. S. 71 (Bk. 26, L. ed. 1012); *Thompson* v. *Lee County*, 3 Wall. 330 (70 U. S. Bk. 18, L. ed. 178); *Brown* v. *Mayor*, 63 N. Y. 244; Cooley, Const. Lim. 474, 477, 4th ed.; Dill. Mun. Corp. §46."

In *Ennis Waterworks* v. *City of Ennis*, 233 U. S. 652, 58 L. ed. 1139, the City of Ennis, in March, 1909, by ordinance, granted defendant's assignor the privilege of supplying water to the City for thirty years. In April, 1909, an ordinance was passed repudiating this grant, alleging that the prior ordinance was void. The City sued to have the contract alleged to have been granted by the first ordinance declared void. Judgment was rendered in favor of the City. The defendant sought to have the judgment below reversed on the theory that such a judgment gave effect to the subsequent ordinance and thereby impaired

the obligation of contract in violation of the Constitution of the United States.

This court, in dismissing the cause for want of jurisdiction, discussed only one of the various grounds challenging the jurisdiction of the court. The ground discussed was, in the language of the court (p. 1140, L. ed.):

> "That even if it be the duty of this court to determine for itself whether the state court rightly concluded that there was originally no contract, nevertheless there is no jurisdiction in this case because the court below, in deciding that there was originally no contract, based its action upon a rule of state law which had been so conclusively determined at the time the alleged ordinance relied on as a contract was adopted, that the assertion that there is a contract right is of so frivolous and unsubstantial a character as to afford no basis for jurisdiction."

In discussing this contention, the court said (p. 1140, L. ed.):

> "The face of the record so clearly manifests the correctness of the third proposition that we pass at once to its consideration. It is apparent on the face of the opinion of the court below that it did not at all rest its conclusion upon original reasoning concerning the asserted contract, but only applied to the decision of that question a doctrine which, long prior to the adoption of the ordinance relied on as a contract, had been announced by the court of last resort of Texas * * *."

In the case at bar it is apparent on the face of the opinion of the court below that the Supreme Court of Illinois did not base its conclusion that the Miller Act of 1926 did not constitute a contract upon original reasoning concerning the asserted contract. It was merely applying a long line of decisions which had been handed down for many years prior to the enactment of that statute.

In further discussing the issues in the *Ennis* case, the court said (p. 1141, L. ed.):

> "It is insisted, however, that since it is our duty when the assertion is made that contract rights are impaired to determine for ourselves whether or not there was a valid contract, we must hence now determine this controversy by resort to original reasoning without regard to the action of the court below in applying the state rule. But while the premise upon which this contention rests is well founded, the error lies in the deduction which seeks to make it applicable to this case. This is clearly the case, since the doctrine which the premise embodies is subject to this qualification, that where a contract which is relied upon arises from a state law or municipal ordinance having the effect of such law, in interpreting for itself such law or ordinance this court will not give to it a meaning in conflict with the settled rule of the state at the time the law was enacted or the ordinance adopted. In other words, that where we come to consider a contract arising from a state law or ordinance, we will treat it as if there was embodied in their text the settled rule of law which existed in the state at the time the state action relied upon as a contract was taken. (Citing cases.)"

In the case at bar the court is considering a pension law passed subsequent to the time when a long line of decisions had settled the interpretation to be given pension laws of this type. The law as expounded in the *Ennis* case would seem to make it compulsory for this court to give to the statute in question the effect that this long line of Illinois decisions has given to similar statutes.

We are aware of the fact that it has often been asserted by this court that where the interpretation of a contract is before it, it is not compelled to rely upon the interpretation arrived at by the court of the State where the contract was entered into, and we concede that such is the

rule where the State court has interpreted for the first time the contract in question. Thus, if the expression of the Supreme Court of Illinois in *Dodge* v. *Board of Education* had been the first expression of the Illinois Supreme Court to the effect that pensions were the bounty of the State and not contract obligations, then the Supreme Court of the United States would not be compelled to accept their interpretation of a statute giving pensions. The case is different, however, where prior to the formation of the contract the State by the decisions of its highest court has fixed an interpretation of the provisions of a statute. This distinction is recognized in the *Ennis* case, and we respectfully submit should be followed by this court.

In *Olcott* v. *Board of Supervisors, supra,* the court, in discussing the validity of a contract entered into by the Supervisors of Fond du Lac County, Wisconsin and a railroad company, in 1869 under a statute passed in 1867 where state decisions prior to the formation of the contract had favored the validity of such a contract, said at page 387 (L. ed.):

> "Parties have a right to contract, and they do contract, in favor of the law as declared to them when their engagements are formed. Nothing can justify us from holding them to any other rule."

The court then went on to show that the decisions of the Wisconsin Supreme Court, prior to the time of the formation of the contract, were determinative of the constitutionality of the Act of 1867.

In pointing out that a line of state decisions has indicated the effect which will be given a certain statute and the rights which will arise under the court's interpretation of that statute, this court has always given weight to

decisions prior to the enactment of the statute which is being interpreted.

Anderson v. *Township of Santa Anna, supra.*
Olcott v. *Board of Supervisors, supra.*
Douglas v. *Pike County,* 101 U. S. 677, 25 L. ed. 968.

In the latter case the court, after reviewing the Missouri decisions which are cited as fixing the rights of the contracting parties under a certain statute, said at page 971 (L. ed.):

> "While some of the decisions were rendered before the passage of the Township Act, it is so clear that the peculiar language of that act was the consequence of those decisions that we do not deem it unreasonable to give the effect they would have if made afterwards."

In *Great Northern Railway Co.* v. *Sunburst Oil and Refining Co., supra,* plaintiff sued to recover alleged overcharge for shipping. The charge made had been approved by the Railroad Commission of Montana and then subsequently disapproved. The transactions complained of occurred in 1926. In 1921 the Supreme Court of Montana had decided that after certain preliminary conditions were satisfied, an action for restitution for alleged overcharges might be maintained against a carrier. Following this decision the trial court awarded restitution to the plaintiff.

Anent the action of the trial court, this court, said, on page 365 (L. ed.):

> "The trial court did not impair a Federal right by giving to a statute of the state the meaning that had been ascribed to it by the highest court of the state, unless such impairment would have resulted if the meaning had been written into the statute by the legislature itself. But plainly no such consequence would have followed if that course had been pursued. The

Doney case was decided, as we have seen, in 1921. The transactions complained of occurred between August, 1926, and August, 1928. Carrier and shipper understood at that time that the rates established by the Commission as the delegate of the legislature were provisional and tentative. Valid for the time being the rates indubitably were a prop for conduct while they stood, but the prop might be removed, and charges, past as well as present, would go down at the same time. By implication of law there had been written into the statute a notice to all concerned that payments exacted by a carrier in conformity with a published tariff were subject to be refunded if found thereafter, upon sufficient evidence, to be excessive and unreasonable. The Constitution of the United States would have nothing to say about the validity of a notice of that tenor written in so many words into the body of the act. Carrier and shipper would be presumed to bargain with each other on the basis of existing law. *Coombes* v. *Getz*, 285 U. S. 434, 76 L. ed. 866, 52 S. Ct. 435. The validity of the notice is no less because it was written into the act by a process of construction. *Supreme Lodge, K. P. v. Meyer*, 265 U. S. 30, 32, 68 L. ed. 885, 887, 44 S. Ct. 432. The inquiry is irrelevant whether we would construe the statute in the same way if the duty of construction were ours and not another's.

Supreme Lodge, K. P. v. Meyer, supra (265 U. S. 33, 68 L. ed. 888, 44 S. Ct. 432). Enough for us that the construction, whether we view it as wise or unwise, does not expose the court that made it to the reproach of withholding from the carrier the privileges and immunities established by the constitution of the nation."

In the case at bar long before the hour of making the alleged contract between appellants and appellees, the Supreme Court of Illinois had held time and time again that pensions were bounties of the State of Illinois and as such were revocable at the will of the State. These decisions made as they were before the hour of contract, should be considered reservations of the right of the state to modify the Miller Law.

V.

The Miller Law of 1935 was passed pursuant to the sovereign powers of the State of Illinois. It is a local governmental law and as such should be sustained by this court.

Appellees have heretofore contended in their motion to dismiss that this court is without jurisdiction to review the decision of the court below because such review would involve passing upon a statute of the State of Illinois passed pursuant to its sovereign power and the mandate of its State constitution.

The establishment, administration, maintenance and operation of a system of free schools is one of the declared sovereign powers of the State, reserved to the State, and is primarily the affair of the State. *Gong Lum* v. *Rice,* 275 U. S. 78, 72 L. ed. 172, *Cummings* v. *Richmond County Board of Education,* 175 U. S. 528, 44 L. ed. 262, *Marshall* v. *Donovan,* 10 Bush. (Ky.) 681, 690.

Moreover this court has declared its great reluctance to interfere with the exercise of such a sovereign power, stating in *Cummings* v. *Richmond County Board of Education, supra,* at page 266 (L. ed.):

> The education of the people in schools maintained by State taxation is a matter belonging to the respective States and any interference on the part of the Federal authorities with the management of such schools cannot be justified except in the case of a clear and unmistakable disregard of rights secured by the supreme law of the land."

In Illinois, the Constitution provides that

> "The General Assembly shall provide a thorough and efficient system of free schools whereby all children

of this State may receive a good common school education.'' Art. VIII, Sec. 1.

By virtue of this provision, the General Assembly has full authority to enact such laws as it may deem necessary and expedient for the proper administration and regulation of public schools in the promotion of their efficiency.

Keime v. *Community High School District,* 348 Ill. 228.

Kinnare v. *City of Chicago,* 171 Ill. 332.

Lindstrom v. *City of Chicago,* 331 Ill. 144.

Groves v. *Board of Education* (Appendix, p. 102).

The foregoing provision of the Constitution of the State of Illinois and the Illinois cases cited *supra* establish the proposition that the regulation of education is one of the sovereign powers of the State.

This court, in *Home Building & Loan Association* v. *Blaisdell,* 290 U. S. 398, 434, 78 L. ed. 413, 426, in pointing out the effect which the exercise of a sovereign power would have on claimed contractual rights said:

> ''Not only is the Constitutional provision qualified by the measure of control which the State retains over remedial processes but the State also continues to possess authority to safeguard the vital interests of its people. It does not matter that legislation appropriate to that end 'has the result of modifying or abrogating contracts already in effect.' *Stephenson* v. *Binford,* 287 U. S. 251, 77 L. ed. 288. Not only are existing laws read into contracts in order to fix obligations as between the parties, but the reservation of essential attributes of sovereign power is also read into contracts as a postulate of the legal order. The policy of protecting contracts against impairment presupposes the maintenance of a government by virtue of which contractual relations are worth while,—a government which retains adequate authority to se-

cure the peace and good order of society. The principal of harmonizing the constitutional prohibition with the necessary residuum of state power has had progressive recognition in the decisions of this Court. * * *

"The reservation of this necessary authority of the state is deemed to be a part of the contract. In the case last cited, the Court answered the forcible challenge of the state's power by the following statement of the controlling principle,— a statement reiterated by this court speaking through Mr. Justice Brewer, nearly fifty years later, in *Long Island Water Supply Co.* v. *Brooklyn*, 166 U. S. 685, 'But into all contracts, whether made between states and individuals, or between individuals only, there enter conditions which arise not out of the literal terms of the contract itself; they are superinduced by the preexisting and higher authority of the laws of nature, of nations or of the community to which the parties belong; they are always presumed, and must be presumed, to be known and recognized by all, are binding upon all, and need never, therefore, be carried into express stipulation, for this could add nothing to their force. Every contract is made in subordination to them, and must yield to their control, as conditions inherent and paramount wherever a necessity for their execution shall occur.' * * * The economic interests of the state may justify the exercise of its continuing and dominant protective power notwithstanding interference with contracts. * * *

"And if state power exists to give temporary relief from the enforcement of contracts in the presence of disasters due to physical causes such as fire, flood or earthquake, that power cannot be said to be nonexistent when the urgent public need demanding such relief is produced by other and economic causes."

Other decisions have pointed out that the State's regulation of education comes within the purview of police powers, *Barbier* v. *Connolly*, 113 U. S. 27, 28 L. ed. 923; *Interstate Const. Co.* v. *Massachusetts*, 207 U. S. 79, 52 L. ed. 111, and the State's exercise of such power should not

be interfered with by this court. As was said in *Louisville etc. R. Co.* v. *Kentucky,* 161 U. S. 677, 701, 40 L. ed. 849, 859:

> "Whatever is contrary to public policy or inimical to the public interests is subject to the police power of the State and within legislative control and in the exertion of such power the legislature is vested with a large discretion which if exercised bona fide for the protection of the public is beyond the reach of judicial inquiry."

This court has pointed out that the exercise of such power will not be interfered with by this court even if it should impair the obligation of a contract. Thus in *Manigault* v. *Springs,* 199 U. S. 473, 480, 50 L. ed. 274, 278, the court said:

> "It is the settled law of this court that the interdiction of statutes impairing the obligation of contracts does not prevent the state from exercising such powers as are vested in it for the promotion of the common weal, or are necessary for the general good of the public, though contracts previously entered into between individuals may thereby be affected. This power, which, in its various ramifications, is known as the police power, is an exercise of the sovereign right of the government to protect the lives, health, morals, comfort, and general welfare of the people, and is paramount to any rights under contracts between individuals."

The *Manigault* case was quoted from with approval in the *Blaisdell* case, *supra.*

The Miller Act of 1935 was clearly enacted for the public good and had for its object the lessening of the tax burden on the people of the State of Illinois during a time of financial depression and tax crisis, and also the readjustment and fair realignment of the two pensions granted to

retired school teachers of Chicago with the salaries paid to teachers active in the service.

This situation was referred to by the Supreme Court of the State of Illinois in *Groves* v. *Board of Education, supra,* where the Court says:

> "The act (Miller Act of 1925 as amended in 1927) made no provision whatever for the levy of an additional tax for funds out of which Miller Act annuities were to be paid. The Board, therefore, was required to pay them out of the existing taxes levied for educational purposes, and the money set aside for current salaries of active teachers was decreased by the amount of such annuities."

The right of the Legislature to exercise its sovereign power in the economic interests of the State is made clear in *Home Building & Loan Assn.* v. *Blaisdell, supra,* wherein the court said on page 428 (L. ed.):

> "The economic interests of the State may justify the exercise of its continuing and dominant protective power notwithstanding interference with contracts."

VI.

Where a statute is claimed to create a contractual right, this court will give weight to the construction of the statute by the courts of the state, unless such construction is palpably erroneous.

The court below in unequivocal terms held that the pensions paid under the Miller Law were not based upon contract. On page 550 of its opinion found in 364 Ill. 547, it says:

> "As stated by counsel for appellants in their reply brief, 'Appellants' case rests upon the proposition that they have vested property rights to the payment of future installments of the annuities on the basis fixed

by the law in force at the time they retired, or being entitled to retire, or made application for retirement.' ''

In deciding adversely to this contention, the court on page 552 said:

> "A right, to be within the protection of the constitution, must be a vested right. It must be something more than a mere expectancy based upon an anticipated continuance of an existing law. If before rights become vested in particular individuals, the convenience of the state induces amendments or repeal, such individuals have no cause to complain. * * * The decisions of this court have uniformly been that pensions are not based upon contract but are mere expectancies based upon anticipated continuance of existing law, and that future installments of pensions are not vested property rights. It follows that the state may reduce future installments of pensions without violating the provisions of the state or federal constitution."

This decision is sustained not only by the cases cited in that opinion but the principles announced have been adhered to in all Illinois cases without exception.

In the recent case of *Phelps* v. *Board of Education, supra,* it was contended that under the statute in question there was granted to teachers, permanency in position at fixed salaries which could not be impaired by a subsequent act of the legislature. This contention is identical in principle with that of appellants, who contend that the Illinois statute granted to them permanency of pension at fixed pension rates, which could not be changed by subsequent acts of the legislature.

In order to point out to the court the similarity of the *Phelps* case to the one at bar, we set up in parallel columns the contentions and the State Court decisions in the respective cases:

PHELPS CASE.

1. Appellants contended that the decision of the State Court violated Art. 1, Sec. 10 and Sec. 1 of the 14th Amendment of the Federal Constitution.

2. Appellants contended that the statute pertaining to tenure of teachers prior to its amendment conferred upon teachers a contractual status which the legislature was powerless to alter.

3. Appellants contended that the legislature having provided that the compensation should not be reduced, violated the Constitution when it subsequently reduced or authorized a reduction in compensation.

4. The Supreme Court of New Jersey held that the tenure act of 1909 "established a status for teachers but * * * failed to see that it established a contractual one that the legislature may not modify" and the court further held that "the status of tenure teachers, * * * is in essence dependent on a statute, like that of the incumbent of a statutory office, which the legislature at will may abolish or whose emoluments it may change."

DODGE CASE.

1. Appellants contend that the decision of the State Court violated Art. 1, Sec. 10 and Sec. 1 of the 14th Amendment of the Federal Constitution.

2. Appellants contend that the Miller Law prior to its amendment conferred on retired teachers or those who made application for retirement a contractual status which the legislature is powerless to alter.

3. Appellants contend that the legislature having fixed the amount of pension at $1500, violated the Constitution, when it reduced it to $500.

4. In the case at bar, the Supreme Court of Illinois held "The decisions of this court have uniformly been that pensions are not based on contract but are mere expectancies based upon anticipated continuance of existing laws, and that future installments of pensions are not vested property rights. It follows that the State may reduce future installments of pensions without violating the provisions of the State or Federal Constitution."

This court in the *Phelps* case, *supra,* in passing upon the weight that should be given to the decision of the Supreme Court of New Jersey and in affirming it, said:

> "This court is not bound by the decision of a state court as to the existence and terms of a contract, the obligation of which is asserted to be impaired, but where a statute is claimed to create a contractual right we give weight to the construction of the statute by the courts of the state. Here those courts have concurred in holding that the act of 1909 did not amount to a legislative contract with the teachers of the state and did not became a term of the contracts entered into with employes by boards of education. Unless these views are palpably erroneous we should accept them."

In support of this holding this Court cited the cases of *Freeport Water Co.* v. *Freeport,* 180 U. S. 587, 595, *Tampa Water Works* v. *Tampa,* 199 U. S. 241, 243; *Milwaukee Elec. Ry. Co.* v. *Railroad Comm.,* 238 U. S. 174, 184; *Seton Hall College* v. *South Orange,* 242 U. S. 100, 103, *Coombes* v. *Getz,* 285 U. S. 434, 441.

Conclusion.

We respectfully submit that the court should sustain the motion to dismiss for the reasons heretofore stated in our statement opposing jurisdiction and for the additional reasons as set forth in the foregoing brief and argument.

In the alternative, we respectfully urge that the decision of the court below should be affirmed and in support thereof we submit that appellees have shown that no offer was ever made by the State of Illinois to appellants to enter into a contract whereby they would, upon compliance with the terms of the Miller Act, receive $1,500.00 annually for life; that even if such an offer was made, appellants furnished no consideration which would establish

the contract contended for; that even if the contract was established, the right of the legislature to modify the provisions of that contract was an essential part of and included as a provision in the Miller Law, and therefore that in decreasing the pensions of appellants the State of Illinois did not violate any of the provisions of the Constitution of the United States; that in any event, the Miller Law was passed pursuant to the sovereign power of the State of Illinois and should be sustained as an exercise of such power; that this court should affirm the decision of the lower court because that decision represents the long settled rule of law in Illinois as well as in other jurisdictions.

Respectfully submitted,

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APPENDIX.

Miller Law as in Force Prior to 1935 Amendments.

"An Act to Provide for the Compulsory and Voluntary Retirement of Teachers, Principals, District Superintendents, and Assistant Superintendents, and for the Voluntary Retirement of Superintendents of Schools and Members of the Board of Examiners, and for the Payment of Retirement Annuities.' (Approved May 19, 1926; title as amended by act approved June 17, 1929, L. 1929, p. 732.)

Be it enacted by the People of the State of Illinois, represented in the General Assembly:

614a. Retirement of Teachers, Etc.) Sec. 1. In every city in this State having a population exceeding 250,000 inhabitants, the board of education of such city shall retire from active service on February 1 and August 1 of each year, all teachers, principals, district superintendents, and assistant superintendents in the public schools of such city in accordance with the following schedule:

(a) In the year 1926 all teachers, principals, district superintendents, and assistant superintendents, seventy-five or more years of age, shall be retired from active service.

(b) In the year 1927 all teachers, principals, district superintendents, and assistant superintendents seventy-four or more years of age shall be retired from active service.

(c) In the year 1928 all teachers, principals, district superintendents, and assistant superintendents seventy-three or more years of age, shall be retired from active service.

(d) In the year 1929 all teachers, principals, district superintendents, and assistant superintendents seventy-two or more years of age, shall be retired from active service.

(e) In the year 1930 and in each and every year thereafter, all teachers, principals, district superintendents, and assistant superintendents seventy or more years of age, shall be retired from active service.

614b. Annual Pension.) Sec. 2. Each person so retired from active service who served in the public schools of such city for twenty or more years prior to such retirement, shall be paid the sum of fifteen hundred dollars ($1,500.00) annually and for life from the date of such retirement from the money derived from the general tax levy for educational purposes: Provided, that any teacher, principal, district superintendent, or assistant superintendent so retired and receiving such annuity shall be subject to the call of the superintendent of schools in such city for consultation and advisory service. And, provided further, that nothing in this Act contained shall in any way impair or prejudice any rights of a teacher, principal, district superintendent, or assistant superintendent so retired to annuity under other statutory provisions concerning any teachers' pension fund, or teachers' pension and retirement fund, established in accordance with the provisions of any statute of this State; and shall not repeal or modify any other such statutory provisions.

614c. Voluntary Retirement—Annuity.) Sec. 3. Any superintendent of schools or member of the board of examiners and all teachers, principals, district superintendents, and assistant superintendents, now or hereafter serving in any of the aforesaid capacities in the public schools of such city, and whose services in any one or more of any

educational positions in the public schools of such city within the last twenty (20) years prior to retirement under this Act, shall aggregate, when taken together, fifteen (15) years or more, and who have served in the public schools of the United States for twenty-five years or more, and who are sixty-five (65) or more years of age, and who have not reached the age of compulsory retirement, as provided in sections one and two of this Act, shall upon their own request, be retired from active service and thereafter be paid annuities for life from the moneys derived from the general tax levy for educational purposes; provided that no superintendent of schools or member of said board of examiners shall be subject to compulsory retirement under the provisions of this Act, during his or her term of office.

Such annuities shall be paid respectively according to the following table of ages and annuities annually:

Age 65.....Ten hundred dollars.....($1,000)
Age 66.....Eleven hundred dollars.....($1,100)
Age 67.....Twelve hundred dollars.....($1,200)
Age 68.....Thirteen hundred dollars.....($1,300)
Age 69.....Fourteen hundred dollars.....($1,400)

And provided that the age of sixty-five (65) and at any year of age thereafter, the board of education of such city may require a physical or a mental examination of any such teacher, principal, district superintendent, or assistant superintendent upon the request of the superintendent of schools of such city and if any such teacher, principal, district superintendent, or assistant superintendent be found incapacitated for service after trial as already or hereafter provided by law he shall be retired at the annuity above provided for that age of voluntary retirement.

And provided further, that all such superintendents of schools, members of the board of examiners, teachers, prin-

cipals, district superintendents, and assistant superintendents shall be subject to the same conditions as to advisory service as provided for in Section 2 of this Act. Nothing contained in this Act shall in any way impair or prejudice the right of any superintendent of schools, member of the board of examiners, teacher, principal, district superintendent, or assistant superintendent so retired to annuity under other statutory provisions concerning any teachers' pension fund or teachers' pension and retirement fund established in accordance with the provisions of any statute of this State, and the payment to be made under this section, or the Act which it amends, shall be in addition to any such annuity."

(As amended by Act approved June 17, 1929. L. 1929, p. 732.)

Section added: L. 1927, p. 792.

(Smith-Hurd Ill. R. S. 1933, Ch. 122, Par. 614a (Sec. 1), 614b (Sec. 2) and 614c (Sec. 3).)

Miller Act of 1935.

(Act Complained of.)

"An Act to Provide for the Compulsory Retirement of Teachers, Principals, District Superintendents, and Assistant Superintendents, and for the Payment of Retirement Annuities.

Be it enacted by the People of the State of Illinois, represented in the General Assembly:

614a. Retirement of Teachers, etc.) Sec. 1. In every city in this State having a population exceeding 250,000 inhabitants, the board of education of such city, as soon as practical after this law becomes effective, shall retire all teachers, principals, district superintendents and assistant

superintendents in the public schools in such city, who are sixty-five or more years of age, and thereafter shall retire all teachers, principals, district superintendents and assistant superintendents in the public schools of such city, on attaining the age of sixty-five years.

614b. Annual Pension.) Sec. 2. Each person so retired from service shall be paid the sum of Five Hundred Dollars ($500.00) annually and for life from the date of such retirement from the money derived from the general tax levy for educational purposes: Provided, that any teacher, principal, district superintendent, or assistant superintendent so retired and receiving such annuity shall be subject to the call of the superintendent of schools in such city for consultation and advisory service: And, provided further, that nothing in this Act contained shall in any way impair or prejudice any rights of a teacher, principal, district superintendent, or assistant superintendent so retired to annuity under other statutory provisions concerning any teachers' pension fund, or teachers' pension and retirement fund, established in accordance with the provisions of any statute of this State.

614c. Sec. 3. Repealed."

Smith-Hurd, Ill. R. S. 1935, Chap. 122, par. 614a, sec. 1; par. 614b, sec. 2; par 614c, sec. 3.

Dodge v. Board of Education (364 Ill. 547).

IN SUPREME COURT OF ILLINOIS
June Term, A. D. 1936
Number 23661. Agenda 24

CHESTER C. DODGE et al., Appellants,

vs.

BOARD OF EDUCATION OF THE CITY OF CHICAGO et al., Appellees
Appeal from Superior Court, Cook County
OPINION—Filed October 27, 1936

"Mr. Justice STONE delivered the opinion of the Court:

Appellants' bill filed in the Superior Court of Cook County seeking to enjoin appellees, Board of Education of the City of Chicago and others, from reducing teachers' pensions as applied to them, was dismissed for want of equity. They bring the cause here on the ground that a constitutional question is involved in the construction given the act by the chancellor.

The original complaint was filed by twenty plaintiffs as a class suit on behalf of themselves and all others similarly situated. The Board of Education of the City of Chicago and certain of its officers and the City of Chicago and certain of its officers were made defendants. The act which is made the basis of this complaint is commonly known and is hereinafter referred to as the Miller Act. It is an act having to do with teachers' pensions (Smith-Hurd Stat. 1927, Chap. 122, par. 614a, p. 2586). Complaint of the appellants is, that by the revision of that act in 1935 vested rights of those teachers who had retired, or sought to do so, prior to the enactment of such revision were taken away. These appellants all have either retired or sought

to retire before the 1935 amendment of the Miller Act. The only provision of that amendment here attacked has to do with the reduction of pensions provided by the act.

This act was originally passed in 1926 and entitled, "an act to provide for the compulsory retirement of teachers, etc., and the payment of retirement annuities." The act provides a pension in addition to that provided by the Teachers' Pension act of 1909. As originally enacted the Teachers' Pension act provided for voluntary retirement of teachers. The Miller act provided for compulsory retirement of teachers at the age of 70 and for the payment of retirement annuities of $1500 per annum. This was a separate act and in nowise affected the Teachers' Pension law which provided a pension of $1,000 per year on voluntary retirement. At the time of its passage the Teachers' Pension act was also modified, providing compulsory retirement. The additional annuities under the Miller act are paid solely out of funds raised by taxation. Teachers contribute nothing toward that fund. In 1927 the Miller act was amended to fix, by Section 3, the annuities on a sliding scale from $1,000 to $1,500 to teachers voluntarily retiring between the ages of 65 and 70. This, to teachers retiring under 70, was a reduction from the flat amount of $1,500 given by the original act.

By the amendment effective on July 12, 1935, the title of the act was amended to read as follows: "An act to amend sections 1 and 2 and the title of 'An act to provide for the compulsory and voluntary retirement of teachers, principals, district superintendents, and assistant superintendents, and for the voluntary retirement of superintendents of schools and members of the board of examiners, and for the payment of retirement annuities,' approved May 19, 1926, as subsequently amended, and to re-

peal section 3 of said act." (Session Laws of 1935, p. 1378,) This amended act abolished the provisions for voluntary retirement and fixed the compulsory retirement age at 65 years. The annuities were reduced to a flat rate of $500 annually. A very large number of former teachers have joined in this proceeding, as did some who sought to retire in May and June, 1935, under the Miller act, before the enactment of the 1935 amendment.

Appellants' complaint is bottomed on the proposition that the rights of teachers retiring or entitled to retire prior to the 1935 amendment were fixed and determined by the law in effect at the time of their retirement or written request for retirement and could not be abolished or reduced by subsequent act of the legislature, and that if the 1935 amendment is to be construed as the superior court construed it, it is in violation of section 2, article XIV of the constitution of Illinois and the fifth amendment of the Federal constitution and in violation of section 10, article I of that constitution, as an attempt to take away vested rights, to take property without due process of law, and to impair obligations of contracts. The prayer of the bill is, that the Board and its appropriate officers be required to take the necessary action to permit requests for voluntary retirement under the law in force at the time the requests were made for such, and that it take such action as necessary to restore the annuities then in force. The city of Chicago filed a motion to dismiss the complaint on the ground of want of equity. The board of education answered denying the complainant's right to the relief sought. Many teachers and former teachers intervened.

As is stated by counsel for appellants in their reply brief, "Appellants' case rests upon the proposition that they have vested property rights to the payment of future install-

ments of the annuities on the basis fixed by the law in force at the time they retired, or being entitled to retire, made application for retirement." This question will be first considered. They cite DeWolfe v. Bowley, 355 Ill. 530; Porter v. Loehr, 332 Id. 353; Beutel v. Foreman, 288 Id. 106; People v. Abbott, 274 Id. 380; Hughes v. Traeger, 264 Id. 612 and Pennie v. Reis, 132 U. S. 464, 33 L. ed. 426, in support of this claim.

The case of DeWolf v. Bowley, supra, did not involve the question of vested property rights but announced the oft-repeated doctrine under which pensions to retired officers are sustained, i. e., that a public benefit accrues in two ways: by encouraging such officers or employees to remain in the service, and by retiring from public service those who have become incapacitated from performing the duties as well as they might be performed by younger or more vigorous persons. The opinion in that case reviews decisions of this and other courts.

Porter v. Loehr, supra, concerned an amendment to the Police Pension act which increased the pension of retired police officers and applied such increased pensions to those who had retired under the previous act. The act was held unconstitutional for the reason that the increase of pensions to retired policemen did not contemplate the rendition of any additional service by the pensioners and the amount of their pensions was fixed by law when they retired, and had their sole basis in services rendered prior to retirement. This was the ground upon which the invalidity of the act was held, and not, as counsel for appellants argue, because of retroactive application of such amendment.

Beutel v. Foreman, supra, was a mandamus proceeding to compel the Board administering the Police Pension Fund act to grant a pension. Beutel retired after 20 years of

service as a member of the police force and filed an application for pension. About three months after filing this application the act was amended, adding the requirement that the retired officer shall also have reached the age of 50 years. Beutel had not reached that age and the Board denied his petition. The act prior to the amendment of July, 1917, had no 50-year requirement. It was argued that Beutel had a vested right in a pension when on March 31, 1917, he retired and made application for such pension, and that the legislature could not take away that right by subsequent legislation imposing another requirement. It was argued that the amendment was unconstitutional as violating the property right vested in him. It was there held that Beutel enjoyed no right which could not be altered by the legislature.

A right, to be within the protection of the constitution, must be a vested right. It must be something more than a mere expectancy based upon an anticipated continuance of an existing law. If before rights become vested in particular individuals the convenience of the State induces amendment or repeal, such individuals have no cause to complain. (People v. Clark, 283 Ill. 221; I Lewis on Stat. Const. (2nd ed.) sec. 284.) It was held in the Beutel case that municipalities may take away the right to pensions under circumstances shown in that record without affecting the contract right of pensioners or violating the constitution. Counsel for appellants say that the doctrine of the Beutel case is to be applied only to facts on that record, which showed that no right in the retiring officer had become vested, while here the rights of these retired teachers had become vested before the amendment of 1935. We are unable to see the lack of analogy on the facts. In that case Beutel had complied with the statute as it existed at the

time he retired but it was changed before the Board acted on his application for pension. The opinion in that case discusses the authorities fully and need not be re-examined here. We adhere to the holding there made. None of the cases cited by counsel for appellants have modified the principles laid down in the Beutel case. The decisions of this court have uniformly been that pensions are not based on contract but are mere expectancies based upon anticipated continuance of existing law, and that future installments of pensions are not vested property rights. It follows that the State may reduce future installments of pensions without violating the provisions of the State or Federal constitution.

Counsel for appellants argue that if an amendment may not be made retroactive to include increased pensions to those who had retired before such increase was authorized, then by the same token the legislature should not be permitted to reduce pensions by the retroactive application of such amendatory statute, and they call attention to what they deem an analogy in logic between this case and Porter v. Loehr, supra. It will be observed however that the basis of the holding in the Porter case was not that the amendatory act could not be made retroactive, but the reason for the invalidity of that act as applied to Porter was that an increase of pension to those retiring before such increase was authorized was not in contemplation of services to be rendered nor an inducement to continued service but was a gratuity, and so came within constitutional inhibition.

Appellants' counsel also say that Miner v. Stafford, 326 Ill. 204, supports their contention that this act should not be construed to be retroactive in its application. In that case petitioner's husband was killed some six months before an amendment to the Pension act increasing pensions to

widows of policemen who were killed in service was enacted. It was held that her right to a pension was one given by the act as it existed at the time the right to receive a pension accrued and not by the amendment. While the opinion refers to the fact that nothing is said in the amendatory act showing an intention to give it retroactive application, yet the basis of the opinion was that her right to a pension arose before the amendment was enacted. As is pointed out in Porter v. Loehr, supra, to give a pension act of that character retroactive effect would be to violate the constitutional prohibition against donation of public funds for private interests.

In this case the 1935 amendment of the Miller act by specific reference repealed Section 3, which fixed the amount of the retirement annuities, leaving nothing in the act other than the provision for $500 per annum to authorize the payment of those annuities. It would be difficult to conceive of stronger evidence of legislative intent to make the amendment retroactive in its application.

In Hughes v. Traeger, supra, it was held that a change in the disposition of a fund, a portion of which was contributed from public taxation and a portion from the salaries of employees, does not violate any vested right of those interested therein, since such right, until it accrues, is only in the nature of an expectancy created by law and which the law may revoke or destroy. Counsel argue that this case is authority for their claim of vested right because of the language of the opinion, 'Until the happening of the event designated by the statute for its distribution he has no vested right in the fund but only an expectancy created by the law,' and that in this case the happening of the event designated by the statute was the retirement of teachers under the provisions of the Miller act. The doctrine, as we

have seen, is thoroughly established in this State, that the State may control the giving or taking away of pensions, and, in consideration of such expressions as 'happening of contingency,' this doctrine must be borne in mind. If there became due to any of these appellants any installment under the Act prior to the amendment of 1935 which was not paid they would have a cause of action to recover it, for until a statute is amended the processes of the law are afforded those who are beneficiaries under it. It is not intimated in this case that there are any such unpaid installments.

Pennie v. Reis, supra, relied upon by appellants, arose in California. In 1878 a statute was adopted in that State providing that upon death of a police officer after June 1, 1878, there should be paid to his legal representatives, out of a pension fund established by the act, the sum of $1,000. The act required contributions to the fund, and provided that in case a policeman resigned he should be repaid the amounts he had contributed. On March 4, 1889, a new pension law was enacted, providing for the merger of certain pension funds and repealing the statute under the terms of which $1,000 was to be paid to a deceased policeman's estate. This amendment occurred just nine days before the death of the policeman whose representatives were seeking the award. It was contended there, as here, that the Act of 1889 violated constitutional provisions against the impairment of the obligation of contract and destroyed vested rights. It was held that this was not so. The court there said, that 'until the particular event should happen upon which the money or part of it was to be paid there was no vested right in the officer to such payment. His interest in the fund was until then a mere expectancy created by law and liable to be revoked or destroyed by the same authority.'

The difference in nature between a lump sum pension or award and a continued pension is obvious and is sufficient to mark the difference in the rule with reference to interest therein as found in the decisions of the courts. Under a statute such as the one in Pennie v. Reis, supra, where, on the happening of a certain event, a certain sum of money became due, the interest of the beneficiary when such event takes place is analogous to the interest of a pensioner whose installment or pension has become due under the terms of a Pension act. Pennie v. Reis, supra, does not in any way militate against the rule generally adopted, that pension acts do not create in their beneficiaries a vested interest in future installments of the pensions created thereby.

Counsel for appellants seeks to draw a distinction between the payment of a pension and the payment of an annuity as affecting the question of a vested right therein. The Miller act uses the term 'annuity.' Counsel say that even though this court has held that pensioners have no vested right in future installments of pensions, yet there is a sufficient difference between a pension and an annuity to justify their position that appellants have a vested right in such annuity. They say that annuities are in the nature of compensation for services theretofore rendered for which compensation has been withheld. We are unable to see the distinction. The plan of payment is the same, the purposes are evidently the same, and the use of the term 'annuity' instead of 'pension'—which is but an annuity—does not seem to us to result in the distinction for which counsel for appellants contend. Moreover, it may be observed that counsel's contention that these payments are annuities of compensation withheld for services rendered, if of force, would endanger the entire act, since section 19, article IV, of the Constitution prohibits the granting or authorizing of

extra compensation, fee or allowance to any public officer or contractor after service has been rendered or contract made.

Counsel for appellants also argue that under section 4 of the statute on Statutes (Smith Hurd Stat. 1935, chap. 131, sec. 4, p. 3140), the amendment to the Miller act should be construed as retaining provisions for those teachers who retired before the amendment. Section 4 provides that 'no new law shall be construed to repeal a former law, as to * * * any right accrued or claim arising under the former law * * * before the new law takes effect.' This statute can be of no avail unless the right of appellants to this pension is a vested right. In addition, it may be observed that the Miller act of 1935 is a complete act within itself, revising the old Miller act. There is therefore no room for the application of section 4 of the statute on Statutes.

We are of the opinion that the superior court did not err in dismissing appellants' bill. The decree is therefore affirmed.

Decree affirmed."

"UNITED STATES OF AMERICA

STATE OF ILLINOIS, ss.

At a Supreme Court, Begun and held in Springfield, on Tuesday, the First day of June, in the year of our Lord One Thousand Nine Hundred and Thirty-seven, within and for the State of Illinois.

Present—Chief Justice Paul Farthing
Justice Clyde E. Stone
Justice Norman L. Jones
Justice Elwyn R. Shaw
Justice Warren H. Orr
Justice Lott R. Herrick
Justice Francis S. Wilson
Otto Kerner, Attorney General
Warren C. Murray, Marshal
Attest: Adam F. Bloch, Clerk

BE IT REMEMBERED, that afterward, to-wit, on the 11th day of June, 1937, the opinion of the Court was filed in said cause and entered of record in the words and figures following, to-wit:

John E. Groves, et al., Appellants	Error to
No. 23827	
vs.	
Board of Education of the City of Chicago, et al., Appellees	Appeal from Circuit Court Cook

Docket No. 23827—Agenda 57—October, 1936.

John E. Groves et al., Appellants, vs. The Board of Education of Chicago, Appellee.

Mr. Justice ORR delivered the opinion of the court:

The validity of legislation reducing the compulsory retirement age of school teachers and repealing, or changing, other provisions relating to annuities and the voluntary retirement of teachers, is challenged by this appeal. The case comes here from the circuit court of Cook county where an order was entered dismissing counts 1, 2 and 5 of the second amended bill of complaint, for want of equity.

Appellants are retired school teachers between 65 and 70 years of age who were retired by the Chicago board of education on July 24, 1935, pursuant to the provisions of the law commonly referred to as the Miller act, as revised and in force July 12, 1935. They allege that prior to their involuntary retirement they had taught in the public schools of Chicago for many years; that prior to April 20, 1917, pursuant to the statute then in force, teachers, at the beginning of each school year, were required to be elected, annually, for the next ensuing year; that their employment, prior to April 20, 1917, was contractual, and that such contractual relation continued after the 1917 amendment of such statute became effective; that the effect of the 1917 amendment was to make such contracts perpetual; that in and by such contracts of employment, they acquired vested rights that could not be impaired by subsequent acts of the General Assembly (such as the Miller act) or by resolutions of the board of education adopted pursuant to legislative authority or direction.

The facts disclose that there had been for many years a 'teachers' pension and retirement fund,' maintained principally from taxes levied for that purpose, to which all teachers in the Chicago public schools were required to contribute and from which they received a pension or annuity for life, upon retirement. Prior to 1935, this pension statute provided for pensions, upon retirement, of

from $800 to $1000 per annum. This section of the School Law was amended at the 1935 session of the General Assembly, at the same session that the Miller act was amended, increasing the annuity to be paid on retirement, to $1200. Each of appellants is now receiving this amount from this fund.

At the 1925 session of the General Assembly, the Miller act was passed, providing for another and additional pension of $1500 per annum, to be paid entirely out of tax funds, to Chicago school teachers upon their retirement at 70 years of age and over. The Miller act, as originally passed, made no provision whatsoever for the retirement of teachers between the ages of 65 and 70. At the 1927 session of the General Assembly the act was amended by adding section 3 thereto. This section provided for the voluntary retirement of teachers between 65 and 70 years of age, and required the board of education to retire such teachers, upon their request, and to pay teachers retiring at 65 years of age $1000 a year; at 66 years of age $1100 a year; at 67 years of age $1200 a year; at 68 years of age $1300; at 69 years of age $1400, and at 70 years of age $1500 a year. The act provided for their compulsory retirement at the age of 70. The act made no provision whatever for the levy of an additional tax for funds out of which Miller act annuities were to be paid. The board, therefore, was required to pay them out of the existing taxes levied for educational purposes, and the money set aside for current salaries of active teachers was decreased by the amount of such annuities. These annuities or pensions were required to be, and were, paid in addition to the pensions paid out of the teachers' pension and annuity fund. This amendment to the Miller act was approved June 24, 1927. Laws of 1927, p. 792.

At the regular session of the Fifty-ninth General Assembly held in 1935, three companion bills were passed that are involved in the case at bar, two of which appellants contend are unconstitutional and void. The validity of the third bill—which increased the annuity to be paid to teachers from the public school teachers' pension and annuity fund and increased the taxes to be levied for that fund—is not questioned. One of the acts adopted by the Fifty-ninth General Assembly which appellants charge is unconstitutional and void is entitled: 'An act to amend sections 1 and 2 and the title of 'An act to provide for the compulsory and voluntary retirement of teachers, principals, district superintendents, and assistant superintendents, and for the voluntary retirement of superintendents of schools and members of the board of examiners, and for the payment of retirement annuities,' approved May 19, 1926, as subsequently amended, and to repeal section 3 of said act.' (Laws of 1935, p. 1378.) By this amendment the compulsory retirement age of teachers was reduced from 70 to 65 years, and the annuity to be paid pursuant to this act was reduced to $500. Section 3, the section that required the board of education to retire all teachers on their voluntary application at 65 or more years of age and pay them annuities ranging from $1000 to $1500 per annum, was expressly repealed.

The other act which appellants seek to have declared unconstitutional is: 'An act to amend section 138 of 'An act to establish and maintain a system of free schools,' approved and in force June 12, 1909, as amended.' (Laws of 1935, p. 1337.) This act amended section 138 of the School Law by adding the words 'subject to termination by compulsory retirement at the age of 65 years' after the words 'appointments to teachers and principals shall

become permanent.' This act became effective July 12, 1935, during the summer vacation when the public schools were closed. The board thereupon retired the two appellants and all other teachers coming within the purview of the amendments. Each of appellants is now receiving $1700 per annum from these two pensions above referred to. Appellants contend that prior to the adoption of the 'Otis law' amendments (April 20, 1917) they had yearly contracts of employment; that upon the adoption of these amendments such contracts became perpetual; that in addition to this perpetual contract there is a yearly contract; that the adoption by the board of education of the 'annual school budget,' in which appropriations are made for teachers' salaries pursuant to a salary schedule, and by the acceptance of such salaries by appellants and other teachers, a yearly contract of employment was entered into. They contend that they acquired vested rights pursuant to these contracts and that the acts of the Fifty-ninth General Assembly, and of the board of education, violated the obligation of these contracts and deprived them of property without due process of law. They also allege that political and undue influence was used upon the General Assembly which induced it to adopt the amendments complained of, and that the amendments were passed by the members of both houses under duress; and, finally, that the amendments in question were passed by an illegally constituted General Assembly.

In *Dodge* v. *Board of Education,* 364 Ill. 547, we had occasion to consider the same contentions now raised by appellants concerning the Miller act. We there held the amendment of July 12, 1935, was not invalid, since it did not take away any vested rights to future installments for pensions to teachers who had retired, or applied for re-

tirement, under the law in force prior to the amendment. It was there pointed out that future installments of pensions and annuities, payable solely out of funds raised by taxation, where teachers contribute nothing toward the fund, are not vested property rights, but are mere expectancies based upon the anticipated continuance of existing law and not based on contract. Our decision in the *Dodge* case is buttressed by many previous decisions of this court therein referred to, from which it will be seen that the State may reduce or abolish future installments of pensions payable solely out of State or municipal funds, without violating any provisions of the State or Federal constitutions.

The claim of appellants that their tenure of office became a fixed and vested right which neither the State nor the board of education could later deprive them of, by reason of the act of April 20, 1917, commonly known as the Otis law, is likewise untenable. Their contention on this point is almost identical with the position of appellants in the recent case of *Phelps* v. *Board of Education of the Town of West New York* (N. J.) decided on appeal March 1, 1937 (Nos. 454, 455, October Term, 1936) by the United States Supreme Court. There the appellants likewise claimed that by virtue of an act of the legislature of New Jersey adopted in 1909, three years of service under contract conferred upon a school teacher 'a contractual status indefinite in duration which the legislature is powerless to alter or to authorize the board of education to alter.' The Supreme Court of New Jersey, whose judgment on this point was expressly quoted and affirmed by the Supreme Court of the United States, held that the act of 1909 'established a legislative status for teachers, but we fail to see that it established a contractual one that the

legislature may not modify. * * * The status of tenure teachers, while in one sense perhaps contractual, is in essence dependent on a statute, like that of the incumbent of a statutory office, which the legislature at will may abolish, or whose emoluments it may change.' This decision is conclusive on the point raised.

The act amending section 138 of the School Law, and the Miller act of 1935, pertaining to the compulsory retirement of school teachers, are valid, even though the State has not been reapportioned into senatorial districts since 1901. (*Fergus* v. *Kinney*, 333 Ill. 437; *People* v. *Thompson*, 155 *id.* 451.) The length of term and mode of appointments of teachers are under the control and within the power of the legislature. Section 1 of article 8 of our constitution charges the General Assembly with the duty of establishing and maintaing a system of free schools whereby all children of this State may receive a good common school education. The broad power and discretion of the legislature in regulating school affairs has frequently been recognized by this court. (*Keime* v. *Community High School Dist.*, 348 Ill. 228; *People* v. *Kipley*, 171 *id.* 44.) A legislative enactment for retirement of school teachers or other public employees at the age of 65, is not, in itself, an arbitrary or unusual provision. Whether such a law is wise or unwise is a matter with which this court has nothing to do. (*People* v. *Russel*, 294 Ill. 283; *Catholic Bishop* v. *Village of Palos Park*, 286 *id.* 400.) Where an office is created by statute it is wholly within the power of the legislature creating it, and the length of term and mode of appointment may be altered at pleasure or the office may be abolished altogether. *People* v. *McCormick*, 261 Ill. 413; *People* v. *Olson*, 245 *id.* 288; *People* v. *Loeffler*, 175 *id.* 585.

The decree is affirmed.

Decree affirmed."

SUPREME COURT OF THE UNITED STATES.

No. 5.—October Term, 1937.

Chester C. Dodge, et al., Appellants,
vs.
Board of Education of the City of Chicago, et al.
} Appeal from the Supreme Court of the State of Illinois.

[November 8, 1937.]

Mr. Justice Roberts delivered the opinion of the Court.

The appellants challenge an act of Illinois which they assert impairs the obligation of contracts in contravention of Article I, Section 10, of the Constitution of the United States and deprives them of a vested right without due process contrary to the Fourteenth Amendment. The statute decreased the amounts of annuity payments to retired teachers in the public schools of Chicago.[1]

Since 1895 the State has had legislation creating a teachers' pension and retirement fund, originally the fruit of teachers' contributions and gifts or legacies, but later augmented by allotments from interest received and from taxes. With this fund and the benefit payments thereunder we are not concerned.

Prior to 1917 teachers in the Chicago schools were employed for such terms as the Board of Education might fix.[2] In that year an act was passed providing for a probationary period of three years and prohibiting removal thereafter except for cause.[3]

In 1926 an act, known as the "Miller Law",[4] became effective. This provided for compulsory retirement and for the payment of annuities to retired teachers. By Section 1 the Board of Education was directed to retire teachers from active service on February 1 and August 1 of each year according to the following program:

[1] The act embraces teachers, principals, district superintendents, and assistant superintendents, and retired members of those classes are among the appellants. For the sake of brevity all will be denominated teachers.

[2] Act of June 12, 1909, § 133, Laws of 1909, p. 380.

[3] Act of Apr. 20, 1917, §§ 138 and 161, Laws of 1917, pp. 730, 731; Smith-Hurd Ill. Rev. Stats. 1925, Chap. 122, par. 186, § 161.

[4] Cahill's Ill. Rev. Stats. 1927, Chap. 122, par. 269.

In 1926 those seventy-five years of age or over, in 1927 those seventy-four years of age or over, in 1928 those seventy-three years of age or over, in 1929 those seventy-two years of age or over, and in 1930, and in each year thereafter, those seventy years of age or over. Section 2 provided:

"Each person so retired from active service who served in the public schools of such city for twenty or more years prior to such retirement, shall be paid the sum of fifteen hundred dollars ($1,500.00) annually and for life from the date of such retirement from the money derived from the general tax levy for educational purposes:" . . . .

There were two provisos, the one requiring that the annuitant should be subject to call by the superintendent of schools for consultation and advisory service, and the other declaring that the annuity granted by the act was not to be in lieu of, but in addition to, the retirement allowance payable under existing legislation.

In 1927 a third section was added [5] permitting teachers who had served for twenty-five years or more, and were sixty-five years of age or over, who had not reached the age of compulsory retirement, to be retired upon request and to be paid from One thousand dollars to Fifteen hundred dollars per annum depending upon age at retirement.

The appellants fall into three classes: those who were compulsorily retired under the Miller Law; those who voluntarily retired under the law as amended; and those eligible for voluntary retirement who had signified their election to retire prior to July 1935.

July 12, 1935, a further amendment of the Miller Law was adopted [6] requiring the Board presently to retire teachers then in service who were sixty-five years of age or over and in the future to retire teachers as they attained that age. Each person so retired was to be paid Five hundred dollars annually for life from the date of retirement. The provisions that such teachers should hold themselves available for advisory service and consultation and that the annuity payments should be in addition to those made to retired teachers pursuant to other legislation were retained. Section 3 of the Miller Law, permitting voluntary retirement be-

[5] Act of June 24, 1927, Laws of 1927, p. 792; Cahill's Ill. Rev. Stats. 1927, Chap. 122, par. 26 (3).

[6] Act of July 12, 1935, Laws of 1935, p. 1378; Smith-Hurd Ill. Rev. Stats. 1935, Chap. 122, §§ 614a-614e.

tween the ages of sixty-five and seventy, was repealed. As construed by the State Supreme Court, the new law reduced to $500 the annuities of teachers theretofore retired, or eligible for retirement under the Miller Law, as well as those to be retired subsequent to its enactment.

Some of the appellants filed a class bill, in which the others intervened as co-plaintiffs, alleging that their rights to annuities were vested rights of which they could not be deprived; that the Miller Law constituted an offer which each of them had accepted by remaining in service until compulsory retirement or by retiring; that the obligation of the contract had thus been perfected and its attempted impairment by the later enactment was ineffective; and praying that the Board be commanded to rescind action taken pursuant to the Act of 1935 and enjoined from complying with its provisions. The appellee Board of Education filed an answer in which it denied the existence of a contract and asserted that the payments to be made to appellants were pensions, subject to revocation or alteration at the will of the legislature. The appellee City of Chicago filed a motion to dismiss for want of equity. After a hearing, at which testimony was taken on behalf of the appellants, the trial court dismissed the bill.

The Supreme Court of the State affirmed holding that, notwithstanding the payments under the Miller Law are denominated annuities, they cannot be differentiated from similar payments directed by law to be made to other retired civil servants of the State and her municipalities and are in fact pensions or gratuities involving no agreement of the parties and subject to modification or abolition at the pleasure of the legislature.[7]

The parties agree that a state may enter into contracts with citizens, the obligation of which the legislature can not impair by subsequent enactment. They agree that legislation which merely declares a state policy, and directs a subordinate body to carry it into effect, is subject to revision or repeal in the discretion of the legislature. The point of controversy is as to the category into which the Miller Law falls.

In determining whether a law tenders a contract to a citizen it is of first importance to examine the language of the statute. If it provides for the execution of a written contract on behalf of the state the case for an obligation binding upon the state is clear.[8]

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[7] 364 Ill. 547, 5 N. E. (2d) 84.
[8] *Hall* v. *Wisconsin*, 103 U. S. 5.

Equally clear is the case where a statute confirms a settlement of disputed rights and defines its terms.[9] On the other hand, an act merely fixing salaries of officers creates no contract in their favor and the compensation named may be altered at the will of the legislature.[10] This is true also of an act fixing the term or tenure of a public officer or an employe of a state agency.[11] The presumption is that such a law is not intended to create private contractual or vested rights but merely declares a policy to be pursued until the legislature shall ordain otherwise. He who asserts the creation of a contract with the state in such a case has the burden of overcoming the presumption.[12] If, upon a construction of the statute, it is found that the payments are gratuities, involving no agreement of the parties, the grant of them creates no vested right.[13]

The Supreme Court of Illinois concluded that neither the language of the Miller Law, nor the circumstances of its adoption, evinced an intent on the part of the legislature to create a binding contract with the teachers of the State. While we are required to reach an independent judgment as to the existence and nature of the alleged contract, we give great weight to the views of the highest court of the State touching these matters.[14]

The Miller Law is entitled "An Act to provide for compulsory and voluntary retirement of teachers, . . . and the payment of retirement annuities." The relevant words of Section 1 are: "In every city in this state . . . the board of education of such city shall retire from active service . . . all teachers, [of a given age] . . . ." Section 2 provides: "Each person so retired . . . shall be paid the sum of fifteen hundred dollars ($1,500) annually and for life from the date of such retirement . . . ." Section 3 provides that persons sixty-five years of

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[9] *New Jersey* v. *Wilson*, 7 Cranch 164; *New Jersey* v. *Yard*, 95 U. S. 104.

[10] *Butler* v. *Pennsylvania*, 10 How. 402; *United States* v. *Fisher*, 109 U. S. 143; *Fisk* v. *Jefferson Police Jury*, 116 U. S. 131, 133; *Robertson* v. *Miller*, 276 U. S. 174, 178.

[11] *Crenshaw* v. *United States*, 134 U. S. 99; *Phelps* v. *Board of Education*, 300 U. S. 319.

[12] *Rector, &c. of Christ Church* v. *County of Philadelphia*, 24 How. 300, 302; *Tucker* v. *Ferguson*, 22 Wall. 527, 575; *New Jersey* v. *Yard*, *supra*; *Newton* v. *Commissioners*, 100 U. S. 548, 561; *Wisconsin & Michigan Ry. Co.* v. *Powers*, 191 U. S. 379, 387.

[13] *Pennie* v. *Reis*, 132 U. S. 604; *Lynch* v. *United States*, 292 U. S. 571, 577, and cases cited.

[14] *Larson* v. *South Dakota*, 278 U. S. 429, 433; *Phelps* v. *Board of Education*, *supra*, and cases cited.

age or over "shall upon their own request be retired . . . and thereafter be paid annuities for life . . . ." Appellants admit that this is not the normal language of a contract but rely on the circumstance that they, as teachers, especially those who voluntarily retired when otherwise they would not have been required so to do, rightly understood the State was pledging its faith that it would not recede from the offer held out to them by the statute as an inducement to become teachers and to retire and that the use of the term "annuities" rather than "pensions" was intended as a further assurance of a vested contractual right. The Supreme Court answered this contention by referring to the fact that for years prior to the adoption of the Miller Law, and by a uniform course of decision, it had held that acts indistinguishable from the Miller Law, establishing similar benefit systems, did not create contracts or vested rights and that the State was free to alter, amend, and repeal such laws even though the effect of its action was to deprive the pensioner or annuitant, for the future, of benefits then enjoyed. The cases to which the court refers so decide.[15] The court further held that the legislature presumably had the doctrine of these cases in mind when it adopted the act now under review and that the appellants should have known that no distinction was intended between the rights conferred on them and those adjudicated under like laws with respect to other retired civil servants. We cannot say that this was error.

The appellants urge that the Miller Law, contrary to most of the acts that preceded it, omitted to use the word "pension" and instead used the word "annuity", a choice of terminology based on contract rather than on gift, and implying a consideration received as well as offered. The State Supreme Court answered the contention by saying:

"We are unable to see the distinction. The plan of payment is the same, the purposes are evidently the same, and the use of

[15] *Eddy* v. *Morgan*, 216 Ill. 437, 449; *Pecoy* v. *Chicago*, 265 Ill. 78-80; *Beutel* v. *Foreman*, 288 Ill. 106. The same principles have been consistently announced since 1926. *People* v. *Retirement Board*, 326 Ill. 579; *People* v. *Hanson*, 330 Ill. 79; *McCann* v. *Retirement Board*, 331 Ill. 193. Appellants urge that the authority of the foregoing cases has been shaken by *Porter* v. *Loehr*, 332 Ill. 353, and *DeWolf* v. *Bowley*, 355 Ill. 530, but these cases did not deal with the question presented in the instant case, and what was said with respect to the nature of pensions was in connection with provisions of the State Constitution.

the term 'annuity' instead of 'pension'—which is but an annuity—does not seem to us to result in the distinction for which counsel for appellants contend."

We are of the same opinion, particularly as an examination of the Illinois statutes indicates that, in acts dealing with the subject, the legislature has apparently used the terms "pensions", "benefits", and "annuities" interchangeably as having the same connotation.[16]

The judgment is affirmed.

[16] In acts creating funds through enforced contributions of state and municipal employes, or out of taxes, or both, the titles and the substantive provisions for benefits to retired employes disclose the use of the terms "pensions" and "annuities" interchangeably to describe the payments to be made from the fund. Act of May 24, 1877, Laws, p. 62; Act of May 10, 1879, Laws, p. 72; Act of May 12, 1905, Laws, p. 309; Act of May 24, 1907, Laws, p. 529; Act of June 14, 1909, Laws, p. 133; Act of June 27, 1913, Laws, p. 598; Act of June 29, 1915, Laws, p. 465; Act of May 27, 1915, Laws, p. 649; Act of June 14, 1917, Laws, p. 748; Act of July 11, 1919, Laws, p. 700; Act of July 11, 1919, Laws, p. 743; Act of June 29, 1921, Laws, p. 203.